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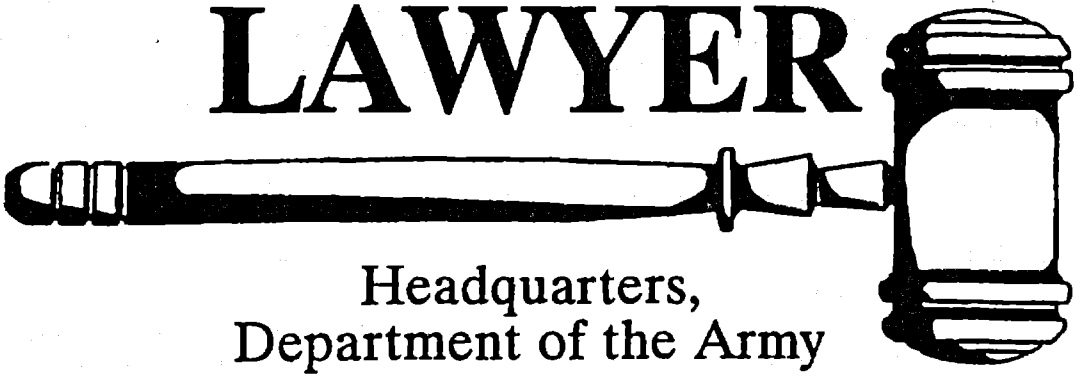

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Urinalysis Administrative Separation Boards in Reserve Components

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Introduction

The Army has long recognized drug use as a serious problem. In particular, drug use poses a special problem in the Reserve Components (RC) of the Army.[1] Because RC soldiers are not subject to the rigors of military inspections and drug testing on a daily basis, detecting drug use is often more difficult. Additionally, because of legal and practical hurdles,[2] disciplining RC soldiers for drug abuse is frequently more difficult.

When an RC soldier is identified as a drug abuser through a urinalysis test, that soldier's commander typically will initiate an administrative separation action.[3] Many RC soldiers processed for separation are entitled to an administrative separation board.[4] Although governed by regulations similar to those governing separations of active duty personnel,[5] these board actions present many legal and practical problems unique to RC units. This article will address these problems and offer suggested approaches for government and defense counsel involved in RC urinalysis cases.[6]

Commander's Options

An RC commander has several options when a urinalysis test yields a positive result indicating that a soldier in the unit has abused drugs. The commander may take no action, take administrative action, or pursue disciplinary options such as nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ)[7] or court-martial. The commander also may be required to process the soldier for administrative separation.[8]

Nonjudicial Punishment

Because the punishments that can be imposed under Article 15 are limited in the RC, commanders rarely use nonjudicial punishment under Article 15 to deal with an RC soldier's positive urinalysis. Most RC soldiers cannot effectively be restricted or required to serve extra duty, because they may only serve punishment while on active duty, active duty training, annual training, or inactive duty training.[9] Additionally, a

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[1] The RC of the Army include both the Army National Guard of the United States and the United States Army Reserve. This article will discuss policies that apply to both.

[2] *See infra* notes 7-17 and accompanying text.

[3] *See infra* notes 18 and 19 and accompanying text.

[4] DEP'T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND ARMY RESERVE: SEPARATION OF ENLISTED PERSONNEL, para. 2-4c (1 Sept. 1994) [hereinafter AR 135-178]; DEP'T OF ARMY, REG. 135-175, ARMY NATIONAL GUARD AND ARMY RESERVE: SEPARATION OF OFFICER PERSONNEL, para. 2-19a(3) (1 May 1971) [hereinafter AR 135-175].

[5] *See* DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (17 Sept. 1990); DEP'T OF ARMY, REG. 635-100, PERSONNEL SEPARATIONS: OFFICER PERSONNEL (1 May 1989) (addressing separation of active duty personnel). The following two regulations, AR 135-178, *supra* note 4, and AR 135-175, *supra* note 4, deal with separation of RC personnel.

[6] Although this article focuses on RC administrative separation actions, many of the suggestions and approaches discussed apply equally to active duty separation actions.

[7] UCMJ art. 15 (1988).

[8] Commanders are required to process soldiers involved in drug distribution for administrative separation. *See* DEP'T OF ARMY, REG. 600-85, PERSONNEL-GENERAL: ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, paras. 9-4, 1-11b(1) (21 Oct. 1988) (IO3, 1 Oct. 1993) [hereinafter AR 600-85]. Commanders also are required to process officers, noncommissioned officers (sergeant and above), and soldiers with three or more years of service (active and reserve) for administrative separation if they are identified as illegal drug abusers, and must process other soldiers for administrative separation if they have been identified in two separate instances of drug abuse. *Id.* para. 1-11b(3) (IO3, 1 Oct. 1993); AR 135-178, *supra* note 4, para. 7-11c1(1), (2). Additionally, commanders are required to process soldiers for administrative separation if they have been medically diagnosed as drug dependent. AR 600-85, *supra* para. 1-11d(1) (IO3, 1 Oct. 1993); AR 135-178, *supra* note 4, para. 7-11c1(3). The requirement to process a soldier for separation does not mean that the commander must recommend separation or that the soldier must be discharged; it only requires that the action be processed through the chain of command to the separation authority for appropriate action. *Id.* para. 7-11c1.

[9] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 21-6 (8 Aug. 1994) [hereinafter AR 27-10].

commander's ability to reduce in rank some RC personnel is limited.[10]

Another major obstacle in imposing nonjudicial punishment on an RC soldier for drug abuse is proving jurisdiction. To establish subject matter jurisdiction, the government must prove that the RC soldier used drugs while on active duty or inactive duty training under Title 10 of the United States Code.[11] Because many drugs remain in the body for a substantial period of time,[12] this may be difficult, if not impossible, to prove, especially if the urinalysis test was administered during a drill weekend.

Courts-Martial

Another option that commanders rarely use in response to an RC soldier's positive urinalysis is trial by court-martial. Courts-martial pose the same jurisdictional problems discussed above.[13] Reserve Component courts-martial also pose considerable logistical difficulties. The accused must be recalled to active duty to be tried by a special or general court-martial under the UCMJ.[14] The RC commander ordinarily must obtain the consent of the supporting active component commander to refer the case to trial, because only active component commanders may convene special and general courts-martial.[15] Additionally, the costs of trying an RC soldier must be paid out of RC funds, if the RC commander initiates the court-martial.[16]

Another hurdle in urinalysis courts-martial is obtaining all the necessary evidence and witnesses. At a court-martial, live testimony from an expert from the drug testing laboratory usually is required; the test result alone is inadequate.[17] Therefore, urinalysis courts-martial can be very expensive.

Administrative Separations

Administrative separation is the option that commanders use most frequently to deal with an RC soldier's positive urinalysis. This option is used primarily because the procedural

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[10] Under DEP'T OF ARMY, REG. 140-158, ARMY RESERVE: ENLISTED PERSONNEL CLASSIFICATION, PROMOTION AND REDUCTION, para. 7-9a (1 July 1990), a commander may not reduce an active guard reserve (AGR) soldier in the grade of E-6 or above through nonjudicial punishment under Article 15, UCMJ.

[11] *See* United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990) (government must prove that RC accused was on federal duty at time the soldier ingested drugs to establish subject matter jurisdiction at court-martial) *and* UCMJ art. 2(d)(2) (1988) (RC personnel may be involuntarily recalled to active duty for purposes of nonjudicial punishment only with respect to offenses committed while on active duty or federal inactive duty training). *But see* United States v. Lopez, 37 M.J. 702 (A.C.M.R. 1993) (court in dicta questioned the validity of *Chodara* and stated that the body continues to use drugs so long as they remain within the body).

[12] The approximate amount of time that drugs can be detected in the body are as follows:

Marijuana:	
Acute dosage (1-2 joints):	2-3 days
Oral ingestion:	1-5 days
Moderate smoker (4 times per week):	5 days
Heavy smoker (daily):	10 days
Chronic smoker (more than 5 joints per day):	14-18 days (may be 20 days or longer)
Cocaine:	2-4 days
Amphetamines:	1-2 days
Barbiturates:	
Short acting (*e.g.* secobarbital):	1 day
Long acting (*e.g.* phenobarbital):	2-3 weeks
Opiates:	2 days
Phencyclidine (PCP):	14 days (up to 30 days in chronic users)
LSD:	8-30 hours

Many factors can influence the "detection times" listed above, such as the amount and quality of the drug ingested and the size, metabolism, and health of the subject. This information was obtained from Syva Company, San Jose, California and LTC Aaron Jacobs, United States Army Forensic Toxicology Drug Testing Laboratory, Tripler Medical Center, Honolulu, Hawaii. Lieutenant Colonel Jacobs provided the authors with a great deal of technical advice; the authors greatly appreciate his assistance.

[13] *See supra* note 11 and accompanying text.

[14] *See* AR 27-10, *supra* note 9, para. 21-8a. Reserve Component soldiers may be tried by summary court-martial under the UCMJ only while serving in a Title 10 status. *Id.* para. 21-7a. The Secretary of the Army, or the Secretary's designee, must approve the accused's orders to involuntary active duty before the accused can be sentenced to confinement or deprived of liberty at a court-martial. *Id.* para. 21-8a. *See also* MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 204 (1984) [hereinafter MCM].

[15] AR 27-10, *supra* note 9, para. 21-8b.

[16] *Id.* para. 21-2d.

[17] United States v. Murphy, 23 M.J. 310 (C.M.A. 1987). Some have argued that judicial notice is an adequate substitute for the testimony of a laboratory expert in a urinalysis case. *See* Wayne E. Anderson, *Judicial Notice in Urinalysis Cases*, ARMY LAW., Sept. 1988, at 19; Willis Hunter & Michael Davidson, *Urinalysis Cases and Judicial Notice*, ARMY LAW., July 1990, at 34. However, the courts generally have found that judicial notice is an inadequate substitute for expert testimony. *See, e.g.*, United States v. Hunt, 33 M.J. 345 (C.M.A. 1991).

and evidentiary rules that apply to administrative separation actions are not as rigorous as those that apply to courts-martial[18] and because subject matter jurisdiction need not be proven.[19]

Reserve Component enlisted soldiers with six or more years regular and reserve military service and those being considered for a discharge under other than honorable conditions are entitled to an administrative separation board.[20] Additionally, all RC officers being considered for separation are entitled to an administrative separation board.[21] Although simpler than a court-martial, these board actions can present many legal and practical problems for both the government representative (recorder)[22] and the defense counsel (respondent's counsel).[23]

Prosecuting a Urinalysis Separation Board

Before prosecuting an RC urinalysis separation board,[24] the recorder must thoroughly prepare the case. When the board meets, the first issue that a recorder may need to address is the constitutional validity of the urinalysis test.[25] The recorder should then attempt to demonstrate that the test was conducted in accordance with the regulations governing urinalysis testing,[26] was scientifically valid, and indicated that the soldier wrongfully used drugs.

Initial Preparation

When the recorder is initially notified that he or she is responsible for a urinalysis board, the recorder should first check the separation packet to ensure that it has been prepared properly. The recorder should ensure that the respondent was correctly notified of the separation action.[27] The recorder also should ensure that the board was properly appointed[28] and is composed of the proper personnel.[29]

Additionally, as soon as the recorder learns of the assignment to a urinalysis case, the recorder should contact the servicing laboratory and request that a litigation packet be sent to the unit. The litigation packet is crucial to the recorder's case; it contains a summary of the laboratory test results indicating the amount of drugs detected during the test. It also contains a memorandum explaining the laboratory drug testing procedures.[30] Request the packet well in advance of the hearing to ensure that the laboratory has enough time to prepare the packet and mail it to the unit and to allow the recorder to provide a copy of the packet to the respondent's counsel in a timely manner. Once the recorder has received the litigation packet, the recorder should contact the laboratory to resolve any questions. If the recorder anticipates any questions concerning the packet that the defense will raise during the hear-

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[18] For example, the Military Rules of Evidence generally do not apply to administrative separation boards. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 3-6a (11 May 1988) [hereinafter AR 15-6].

[19] AR 135-178, *supra* note 4, para. 7-11c1, permits separation of RC enlisted soldiers for abuse of illegal drugs. AR 135-175, *supra* note 4, para. 2-12, permits separation of RC officers for moral or professional dereliction. Neither provision contains any requirement that the drug abuse or dereliction occur while the RC soldier is on duty.

[20] AR 135-178, *supra* note 4, para. 2-4c.

[21] AR 135-175, *supra* note 4, para. 2-19a(3).

[22] AR 15-6, *supra* note 18, para. 5-3.

[23] *Id.* para. 5-6.

[24] For general guidance on prosecuting a urinalysis court-martial, *see* David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 7.

[25] U.S. CONST. amend. IV.

[26] AR 600-85, *supra* note 8, para. 9-12, ch. 10.

[27] Under AR 135-178, *supra* note 4, para. 2-9, an RC enlisted respondent must be notified of the specific allegations on which the separation action is based and the least favorable characterization of service that he or she could receive. For similar notification requirements for RC officers being considered for involuntary separation, *see* AR 135-175, *supra* note 4, para. 2-17.

[28] AR 135-178, *supra* note 4, para. 2-8, provides that an enlisted separation board will be appointed by the area commander in the case of a United States Army Reserve soldier, and by the state adjutant general in the case of a National Guard soldier. The area commander may delegate his or her authority to appoint such boards. *See, e.g.*, Memorandum, Commander, U.S. Army Reserve Command, AFRC-PRR-E, subject: Delegation of Involuntary Separation Authority Under AR 135-178 (13 Dec. 1994). AR 135-175, *supra* note 4, para. 2-17f(3), provides that the area commander appoints officer separation boards.

[29] AR 135-178, *supra* note 4, para. 2-12, requires that an RC enlisted separation board consist of at least three commissioned, warrant, or noncommissioned (sergeant first class or above) officers, at least one of whom is a major or higher. The majority must be commissioned or warrant officers. Noncommissioned officers may not serve when an other than honorable discharge may result and all members must be senior to the respondent. Female or minority members are not required. At least one officer on the board must be from the same RC as the respondent. *Id.* para. 2-8c. AR 135-175, *supra* note 4, para. 2-17f(3), requires that officer separation boards be composed of three or more commissioned officers, all senior in rank to the respondent. One member will be a Regular Army officer, if one is available, and one member must be of the same sex, and, if reasonably available, same branch of service, as the respondent. The Reserve Officer Personnel Management Act will require that all members of an RC officer separation board be in the grade of 0-6 or above. Reserve Officer Personnel Management, *contained in* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2960 (to be codified at 10 U.S.C. § 14906). This provision will be effective on 1 October 1996. *Id.*, 108 Stat. at 3026.

[30] Memorandum, Walter Reed Army Medical Center (HSHL-UDL), subject: U.S. Army Forensic Toxicology Drug Testing Laboratory Drug Testing Procedures (9 Feb. 1994) [hereinafter Laboratory Drug Testing Procedures Memorandum].

ing, the recorder should arrange to have an expert from the laboratory available to testify by telephone.[31]

As soon as a date has been set for the board hearing, the recorder should immediately notify the respondent. The recorder is required to notify the respondent in writing of the date, time, location, and uniform for the hearing. The notification must include the specific allegation to be addressed, the respondent's right to counsel, the witnesses expected to be called, and the respondent's right to be present, present evidence, and call witnesses.[32]

Once the hearing date has been set, the recorder should contact the observer involved in the test as well as the Unit Alcohol and Drug Coordinator (UDAC) who supervised the test to ensure that they will be available, at least telephonically,[33] as witnesses. If the recorder is not prepared to do anything other than introduce the test results, without more, the government's case is in trouble if the respondent or respondent's witnesses testify about irregularities in the collection of the urine specimens. The recorder always should have these crucial witnesses present, or at least on telephonic standby, for rebuttal.

Furthermore, as soon as the hearing date has been set, the recorder also should contact the respondent's counsel to ensure that the counsel has been notified of the time, date, and location of the hearing. If a conditional waiver is acceptable to the commander, the recorder should ask the respondent's counsel whether the respondent is willing to submit this waiver.[34] Additionally, the recorder should ask whether the respondent is willing to stipulate to the alleged drug use.[35]

Prior to the hearing, the recorder should ensure that the facilities where the hearing will be held are adequate.[36] If telephonic testimony is anticipated (as it is in most cases), the hearing room should have a speaker phone. The recorder should have at least one copy for each board member of all of the documents that the recorder plans to introduce at the board, especially the litigation packet.[37] The recorder also should have a Privacy Act statement[38] and rights warning form[39] available, if the respondent chooses to testify. Additionally, the recorder usually will need to prepare a findings and recommendations worksheet.[40] A sample findings and recommendations worksheet for an RC enlisted separation board is located at Appendix A of this article.

While these steps may seem obvious to experienced RC judge advocates who handle boards routinely, they often are overlooked until the week prior to the board hearing. Delay in carrying out these simple tasks can be fatal to the government's case. Even if not fatal, failure to properly notify the respondent, for example, could cause the board to be delayed, move the board members to question the professionalism of the recorder, and afford the respondent undue consideration when the board members deliberate or when the separation authority takes final action.

Proving Constitutional Validity of the Test

The first issue that the recorder may need to address at the board hearing is the constitutional validity of the urinalysis test. Because a urinalysis test is essentially a search and seizure,[41] it must be conducted in accordance with the Fourth Amendment of the United States Constitution.[42] If the test

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[31] *See infra* note 101 and accompanying text.

[32] AR 15-6, *supra* note 18, para. 5-5. In enlisted boards, this notification must be completed at least five working days prior to the hearing. *Id.* In officer boards, the notification must be completed at least ten days prior to the hearing. AR 135-175, *supra* note 4, para. 2-24.

[33] Although AR 15-6, *supra* note 18, does not specifically authorize telephonic testimony, it permits the introduction of anything that, in the minds of reasonable persons, is relevant and material. *Id.* para. 3-6a. Telephonic interviews are relevant and material. *See also* MCM, *supra* note 14, R.C.M. 405g(4)(B)(ii), which states that telephonic interviews are admissible at investigations under Article 32, UCMJ, over defense objection.

[34] AR 135-178, *supra* note 4, para. 2-11b.

[35] The suggested procedure for conducting a formal board of officers mentions that the recorder and respondent may agree to stipulate. AR 15-6, *supra* note 18, fig. 3-1, at 17. *See also* AR 135-178, *supra* note 4, para. 2-15a(4).

[36] AR 15-6, *supra* note 18, para. 5-3a, requires the recorder to ensure the hearing site is adequate and arrange for the necessary support personnel, equipment, and supplies.

[37] *See id.* The recorder also should have all of the documents in the separation packet, including the appointment and notification memoranda, so that they can be submitted as enclosures to the board proceedings.

[38] *See id.* app. B.

[39] Dep't of Army, (DA), Form 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1984).

[40] *See* AR 135-178, *supra* note 4, paras. 2-16, 2-17, for a listing of the requirements of the findings and recommendations in an RC enlisted separation board. *See* AR 135-175, *supra* note 4, para. 2-34, for a listing of the requirements of the findings and recommendations in an RC officer separation board.

[41] *See* MCM, *supra* note 14, MIL. R. EVID. 312(d), 313(b).

[42] U.S. CONST. amend. IV.

was conducted in bad faith (*i.e.*, if officials conducting or directing the test knew it was unconstitutional) the test is not admissible at the board.[43] However, other violations of the Fourth Amendment will not preclude admission of the test.[44]

Typically, the recorder will need to establish that the test was conducted in good faith only in response to an objection by the respondent's counsel.[45] However, the recorder may want to establish this basis in the government's case in chief to show the board that the test was conducted properly.[46] The recorder may rely on any of the theories discussed below to demonstrate good faith. However, the recorder should realize that if he or she bases the validity of the test on either of the last two theories (fitness for duty or medical tests) the respondent may be entitled to an honorable discharge.[47]

Inspections

A urinalysis test is constitutional if it is part of a valid random inspection.[48] The recorder can establish that the personnel who conducted the test believed it to be a proper inspection by calling the commander who ordered it. Alternatively, the recorder may offer a statement of the commander or testimony of individuals who witnessed this order.[49]

Ordinarily, the RC unit commander must order an inspection.[50] However, in some situations, inspections ordered by individuals other than the RC commander may be valid. For example, if the RC unit is attached to an active duty unit, the active duty commander may properly order the inspection.[51]

Probable Cause Tests

A urinalysis test is constitutional if based on probable cause[52] and properly authorized by a military judge, magistrate, or appropriate commander.[53] The recorder can demonstrate that the personnel who conducted the test believed it to be a proper probable cause urinalysis by offering the testimony or statement[54] of the person who authorized the test. Alternatively, the recorder may introduce the authorization itself, if it is in writing.[55]

Probable cause to order a urinalysis may be based on information that the soldier used drugs or that he or she appears intoxicated from something other than alcohol.[56] If probable cause is based on a report of drug use, the report must be sufficiently recent to justify a conclusion that traces of drugs or drug metabolites are still in the soldier's urine, because drugs dissipate from the body over time.[57]

Consent Tests

A urinalysis is constitutional if obtained with the consent of the soldier tested.[58] The recorder may demonstrate that the person conducting the test believed that he or she had valid consent by presenting testimony or a statement. Alternatively,

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[43] AR 15-6, *supra* note 18, para. 3-6c(7). Such a urinalysis test will be admissible only if it can reasonably be determined that the evidence would inevitably have been discovered. *Id.* This is unlikely, given the speed with which drugs dissipate from the body. *See supra* note 12.

[44] AR 15-6, *supra* note 18, para. 3-6c(7).

[45] *Id.* para. 5-8a(2).

[46] *Id.* para. 5-3b(5).

[47] *See infra* notes 68, 73 and accompanying text.

[48] MCM, *supra* note 14, MIL. R. EVID. 313(b); United States v. Bickel, 30 M.J. 277 (C.M.A. 1990).

[49] These alternatives are proper because the Military Rules of Evidence do not apply to separation boards. AR 15-6, *supra* note 18, para. 3-6a.

[50] AR 600-85, *supra* note 8, para. 10-3a.

[51] United States v. Evans, 37 M.J. 867 (A.F.C.M.R. 1993).

[52] MCM, *supra* note 14, MIL. R. EVID. 312(d), 315.

[53] *See* United States v. Kalscheuer, 11 M.J. 373 (C.M.A. 1981). Arguably, an authorization is not required because the speed with which drugs dissipate from the body may create exigent circumstances. *See* Schmerber v. California, 384 U.S. 747 (1966) (warrantless blood alcohol test was justified by exigent circumstances). However, this argument is not usually successful, at least in courts-martial. *See* United States v. Pond, 36 M.J. 1050 (A.F.C.M.R. 1993) (warrantless urinalysis to determine methamphetamine use was not justified by exigent circumstances because methamphetamines do not dissipate sufficiently quickly from the body).

[54] AR 15-6, *supra* note 18, para. 3-6a.

[55] AR 27-10, *supra* note 9, at 101-06, contains reproducible forms to record a written search authorization.

[56] MCM, *supra* note 14, MIL. R. EVID. 312(d).

[57] *Id.* MIL. R. EVID. 315. *See supra* note 12 for a listing of the approximate amount of time that drugs can be detected in the body.

[58] *Id.* MIL. R. EVID. 314(e).

if the consent was in writing, the recorder may introduce the document on which the consent was recorded.[59]

The respondent's consent must have been voluntary under the totality of the circumstances.[60] If the respondent asked what would happen if consent was not given and the commander simply replied that the test would be ordered anyway, the resulting consent is invalid.[61] However, if the commander replied by meaningfully explaining the consequences of a consent test, the respondent's consent is probably valid.[62]

Fitness for Duty Tests

A urinalysis is constitutional if a commander orders it based on reasonable suspicion to determine the soldier's fitness for duty.[63] The recorder can demonstrate that the personnel conducting the test believed it to be a proper fitness for duty test by introducing the testimony or statement of the commander who directed it.[64]

The reasonable suspicion required for a fitness for duty test is the same as the reasonable suspicion required for a "stop and frisk."[65] Reasonable suspicion is more than a mere hunch; it must be based on articulable facts, although it need not rise to the level of probable cause.[66]

A fitness for duty test is subject to the limited use policy.[67] This means that, although such test results are admissible in an administrative separation proceeding, the soldier is entitled to receive an honorable discharge if the government initially introduces such evidence.[68] However, the limited use policy does not apply if the government introduces a fitness for duty test for rebuttal or impeachment purposes.[69]

Medical Tests

A urinalysis is constitutional if conducted for a valid medical purpose.[70] For example, if a soldier reports for medical treatment and acts unusually, a physician may order a drug screen to determine whether the patient is under the influence of drugs.[71] The recorder may demonstrate that the person conducting a test believed it to be a valid medical urinalysis by introducing his or her testimony or statement.[72]

Nearly all medical tests are subject to the limited use policy.[73] If the government initially introduces these test results at an administrative separation proceeding, the respondent must receive an honorable discharge.[74] However, the limited use policy does not apply to a test obtained during a soldier's emergency medical care for a drug overdose, if the treatment resulted from the soldier's apprehension.[75] Additionally,

[59] AR 15-6, *supra* note 18, para. 3-6a.

[60] MCM, *supra* note 14, MIL. R. EVID. 314(e)(4).

[61] United States v. White, 27 M.J. 264 (C.M.A. 1988).

[62] *Id.* Generally, a commander must explain the consequences of a consent sample versus a fitness for duty sample. The commander must explain that a fitness for duty test may only be used for limited administrative actions while a consent test may be used for disciplinary or any other action.

[63] United States v. Bair, 32 M.J. 404 (C.M.A. 1991). *See* AR 600-85, *supra* note 8, para. 10-3a(1).

[64] AR 15-6, *supra* note 18, para. 3-6a.

[65] *Bair*, 32 M.J. at 404.

[66] *Id.*; Terry v. Ohio, 392 U.S. 1 (1968).

[67] AR 600-85, *supra* note 8, paras. 10-3a(1), 6-4a(1).

[68] *Id.* para. 6-5d.

[69] *Id.* para. 6-4e(1).

[70] MCM, *supra* note 14, MIL. R. EVID. 312(f).

[71] United States v. Fitten, 39 M.J. 659 (N.M.C.M.R. 1993), *petition for review granted*, 40 M.J. 40 (C.M.A. 1994).

[72] AR 15-6, *supra* note 18, para. 3-6a.

[73] If a physician directs a urinalysis based on reasonable suspicion that a soldier has abused drugs to determine the soldier's need for counseling or treatment (the medical equivalent of a fitness for duty test), the test is subject to the limited use policy. AR 600-85 *supra* note 8, paras. 10-3b(1), 6-4a(1). Tests taken in conjunction with a soldier's participation in the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) also are subject to the limited use policy. *Id.* para. 6-4a(1). Additionally, tests obtained as a result of a soldier's emergency medical treatment for a drug overdose are subject to the limited use policy, unless the treatment resulted from the soldier's apprehension. *Id.* para. 6-4a(5).

[74] *Id.* para. 6-5d.

[75] *Id.* para. 6-4a(5).

medical tests unrelated to suspected drug abuse or the soldier's participation in the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) may not be subject to the limited use policy.[76]

Proving That the Test Was Properly Conducted

The recorder at an RC urinalysis board should address the procedures used at the unit to obtain the urine sample. The recorder must demonstrate that the respondent submitted the sample shipped to the laboratory. As a practical matter, this is often the "weak link" in the government's case and the primary point that the respondent will challenge at the board. Therefore, this should be the focus of preparation by the recorder.

Reserve Component units use basically the same procedures that active Army units use to conduct urinalysis tests.[77] *Army Regulation 600-85* describes these procedures.[78] The UDAC is responsible for conducting the urinalysis. Soldiers who provide urine samples must be directly observed by another soldier.[79] The label on the sample bottle must include the social security number of the soldier providing the sample and the initials of the soldier, the observer, and the UDAC.[80] The chain of custody of the bottle is recorded on a specimen custody document.[81] The bottle is sealed and shipped directly to the appropriate drug testing laboratory.[82]

To demonstrate that the test was conducted properly, the recorder may introduce testimony from the observer and UDAC who administered the test. These individuals should describe the procedures used during the test, explain how the specimen custody document is used, and describe what they did with the sample and custody document. These individuals need not recall precisely how the sample was handled, as long as they can reasonably establish that the sample sent to the laboratory was the respondent's.[83]

The observer or UDAC also should describe the procedures used to maintain the urine sample once it left their custody. Alternatively, these procedures may be established through official notice[84] by introducing copies of appropriate portions of *AR 600-85*.[85] Appendices B and C of this article contain suggested direct examination questions for the observer and UDAC.

The recorder need not demonstrate an unbroken chain of custody, as required at a court-martial, as long as the recorder demonstrates that the test result is reasonably relevant and material.[86] Deviations from the procedures required by regulation generally do not affect the admissibility of a urinalysis test.[87] However, the defense can use deviations in procedures to attack the weight that board members should give the test.

Proving Scientific Validity of Test

The next issue that the recorder at an RC urinalysis board should address is the procedures used to test the sample and the scientific validity of these tests. The recorder should first determine what procedures the laboratory used in testing the respondent's sample and then gather the evidence necessary to demonstrate to the board that these procedures were scientifically valid.

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[76] *Id.* paras. 6-4a, 10-3b(2).

[77] *Id.* para. 9-12.

[78] *Id.* para. 9-12, ch. 10, app. E.

[79] *Id.* para. 10-3a, app. E, para. E-6. Direct observation does not make the collection of urine an unreasonable search and seizure. *See* Unger v. Zemniak, 27 M.J. 349 (C.M.A. 1989).

[80] AR 600-85, *supra* note 8, app. E, paras. E-2 to E-8.

[81] *Id.* app. E, paras. E-3 to E-9. A Department of Defense (DD) Form 2624 (Feb. 1993) is used. This form replaced DA Form 5180-R (Aug. 1986), which is now obsolete.

[82] *Id.* para. 9-12c.

[83] *See* United States v. Gonzalez, 37 M.J. 456 (C.M.A. 1993) (chain of custody objection was properly overruled at a court-martial despite the observer's inability to recall exactly how the urine specimen was transferred from one container to another).

[84] AR 15-6, *supra* note 18, para. 3-6b.

[85] AR 600-85, *supra* note 8. The recorder should introduce copies of chapters 9 and 10 and appendix E of this regulation.

[86] AR 15-6, *supra* note 18, para. 3-6a.

[87] *See* United States v. Pollard, 27 M.J. 376 (C.M.A. 1989), in which slight deviations in urinalysis testing procedures did not make the test inadmissible at a court-martial. However, in United States v. Strozier, 31 M.J. 283 (C.M.A. 1990), gross deviations in urinalysis testing procedures were held to be sufficient to make a urinalysis test inadmissible at a court-martial. Although the Military Rules of Evidence do not apply at administrative separation boards, matters presented to such boards must be reasonably relevant and material. AR 15-6, *supra* note 18. Arguably, gross deviations in procedures may make a urinalysis test result irrelevant.

Army urinalysis laboratories[88] test all properly received urine samples for metabolites of marijuana and cocaine.[89] They also test each sample for at least one additional drug or drug metabolite.[90] The laboratories conduct two basic types of tests. The first, a radioimmunoassay (RIA) test, is a screening test which is conducted on all samples properly received at the laboratory.[91] The Department of Defense has established cut-off levels for the various drugs detected during this test; if the test does not reveal an amount of drugs or drug metabolites above this level, the sample is reported as negative.[92] Only if the screening test reveals an amount of drugs or drug metabolites above the cut-off level will the second test be performed.[93]

The second test conducted by the laboratories, a gas chromatography/mass spectroscopy test, confirms the presence of drugs or metabolites in the sample.[94] This test is the best scientific method available for detecting drugs or drug metabolites.[95] The Department of Defense has established separate cut-off levels for the various drugs detected during this test as well.[96] A urine sample will be reported as positive only if this test reveals an amount of drugs or metabolites above the cut-off level.[97]

To allow the board to consider the test results, the recorder should introduce the litigation packet prepared by the drug testing laboratory.[98] The packet should be sufficient to estab-

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[88] The Army currently uses four laboratories to test urine samples: the United States Army Forensic Toxicology Drug Testing Laboratory at Fort Meade, Maryland, telephone: (301) 621-7023; the United States Army Forensic Toxicology Drug Testing Laboratory at Tripler Medical Center, Honolulu, Hawaii, telephone: (808) 433-5176; Northwest Toxicology Corporation in Salt Lake City, Utah, telephone: (801) 268-2431; and Pharmachem Corporation in Menlo Park, California, telephone: (415) 328-6200. Northwest Toxicology Corporation currently tests all National Guard urine samples. The Fort Meade laboratory currently tests the majority of United States Army Reserve urine samples, although the Tripler laboratory tests some samples.

[89] A drug metabolite is a waste product that the body produces in response to ingestion of a drug. A soldier's ingestion of a drug can be established by the presence of either the drug or drug metabolites in his or her urine. Laboratory Drug Testing Procedures Memorandum, *supra* note 30, at 1.

[90] The additional drugs tested for include LSD, opiates, PCP, amphetamines, and barbiturates. The laboratory tests for these on a rotating basis or on request. Anabolic steroids also are tested for on a command directed basis or on request. Memorandum, Assistant Secretary of Defense (Health Affairs), subject: Drug Urinalysis Testing Levels (8 Mar. 1991) [hereinafter Drug Urinalysis Testing Levels Memorandum]; Office of Dep't of Defense Coordinator for Drug Enforcement Policy and Support, subject: Interim Policy on Anabolic Steroids (20 Oct. 1993).

[91] DEP'T OF DEFENSE DIRECTIVE 1010.1, DRUG ABUSE TESTING PROGRAM, encl. 3, para. E1 (28 Dec. 1984) [hereinafter DOD DIR. 1010.1].

[92] *Id.* encl. 3, paras. E2, H1. Currently, these cut-off levels are:

Marijuana metabolite (9-carboxyl THC):	50 ng/ml
Cocaine metabolite (benzoylecgonine):	150 ng/ml
Amphetamines:	500 ng/ml
Barbiturates:	200 ng/ml
Opiates:	2000 ng/ml
PCP:	25 ng/ml
LSD:	0.5 ng/ml

Drug Urinalysis Testing Levels Memorandum, *supra* note 90; Office of Department of Defense Coordinator for Drug Enforcement Policy and Support, subject: Drug Screen Testing Levels for Opiates (12 Oct. 1994).

[93] DOD DIR. 1010.1, *supra* note 91, encl. 3, para. F1.

[94] *Id.*

[95] Laboratory Drug Testing Procedures Memorandum, *supra* note 30, at 3-4.

[96] DOD DIR. 1010.1, *supra* note 91, encl. 3, para. F2. Currently, these cut-off levels are:

Marijuana metabolite (9-carboxyl THC):	15 ng/ml
Cocaine metabolite (benzoylecgonine):	100 ng/ml
Amphetamines:	500 ng/ml
Barbiturates:	200 ng/ml
Opiates:	
Morphine:	4000 ng/ml
Codeine:	2000 ng/ml
Heroine metabolite (6-MAM):	10 ng/ml
PCP:	25 ng/ml
LSD:	0.2 ng/ml

Memorandum, Assistant Secretary of Defense (Health Affairs), subject: Drug Urinalysis Testing Levels (8 Mar. 1991); Memorandum, Department of Defense Coordinator for Drug Enforcement Policy and Support, subject: Drug Urinalysis Testing Levels (6 July 1992); Memorandum, Office of Department of Defense Coordinator for Drug Enforcement Policy and Support, subject: Drug Screen Testing Levels for Opiates (7 Dec. 1993).

[97] DOD DIR. 1010.1, *supra* note 91, encl. 3, para. H1.

[98] The litigation packet is admissible at an administrative separation board under AR 15-6, *supra* note 18, para. 3-6a.

lish the scientific validity of the test.[99] The litigation packet contains a summary of the test results, indicating the amount of drugs detected, all of the chain of custody documents pertaining to the specimen, and a detailed listing of all the data pertaining to the tests performed on the sample. Additionally, it contains a memorandum explaining the laboratory's testing procedures—such as the chain of custody and quality control measures used to ensure that the test results are accurate. It also explains the tests themselves and their scientific validity.[100]

Although an administrative separation board does not require live testimony of an expert, the recorder should consider having an expert from the laboratory on stand-by to be interviewed over the telephone.[101] The expert can explain the tests and vouch for the validity of the tests, if the board is not convinced by the litigation packet. Additionally, the expert can answer specific technical questions, such as the plausibility of the respondent's defense to the alleged drug use.

Proving Wrongful Use

The recorder's final task at a urinalysis separation board is to prove that the soldier knowingly ingested illegal drugs.[102] The recorder may do this by relying on the inference that the presence of a drug or drug metabolite in a soldier's urine indicates that the soldier knowingly and wrongfully used drugs.[103] This permissive inference of wrongfulness may be sufficient to prove wrongful use of drugs, even if the respondent presents evidence that the ingestion was not knowing or wrongful.[104]

The recorder also should interview other members in the respondent's unit to determine if any evidence of drug use exists independent of the urinalysis test. If the respondent confessed or made any statements indicating drug use, the recorder should offer these statements into evidence.[105]

Defending a Urinalysis Separation Board

To defend an RC urinalysis board,[106] the respondent's counsel should consider challenging the constitutional validity of the test, the chain of custody procedures used at the unit to collect the urine sample, and the scientific validity of the test. Of these issues, the chain of custody procedure used at the unit is most frequently exploited by defense counsel. The respondent's counsel should interview, at least by telephone, all of the individuals involved in the collection of the sample to determine if the chain of custody contains any weaknesses.

The respondent's counsel also may be able to demonstrate that the respondent's use of drugs was not wrongful. For example, the respondent or other witnesses may be willing to testify that someone slipped drugs into the respondent's food or drink, which the respondent unwittingly ingested.

Another defense tactic is for the respondent to admit to drug use but claim to have been successfully rehabilitated for his or her substance abuse problem. This strategy is most effective when the test occurred long before the hearing date, which, unfortunately, is fairly common. A related tactic is to present character witnesses to demonstrate that the respondent should be retained in the service despite the use of illegal drugs.

Finally, the respondent's counsel should consider whether to attempt to obtain any additional tests to support any of the above defenses. These tests may be either at the government's or, more likely, the respondent's expense.

The facts of each case, the respondent's record and background, the general practice in the RC organization,[107] and the experiences of the respondent's counsel and his or her colleagues before boards within the organization[108] will dictate which of the above defenses the respondent's counsel pursues.

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[99] At a court-martial, on the other hand, the litigation packet alone generally has been held to be insufficient. United States v. Murphy, 23 M.J. 310 (C.M.A. 1987). *See also* United States v. Harper, 22 M.J. 157 (C.M.A. 1986) (test results and expert testimony were sufficient to support drug conviction); United States v. Hunt, 33 M.J. 345 (C.M.A. 1991) (test results and judicial notice were insufficient to support drug conviction).

[100] Laboratory Drug Testing Procedures Memorandum, *supra* note 30.

[101] *See supra* note 33. Most drug testing laboratories are willing to make an expert available for a telephone interview during the weekend when RC separation boards are usually held. Unfortunately, because of time differences and past misuse of expert witnesses, most laboratories are only willing to make the expert available during a short window of time, such as one hour.

[102] To be guilty of wrongful use of drugs under UCMJ art. 112a (1988), a soldier must have known that he or she was consuming a controlled substance. United States v. Mance, 26 M.J. 244 (C.M.A. 1988).

[103] *Mance*, 26 M.J. at 244; United States v. Alford, 31 M.J. 814 (A.F.C.M.R. 1990).

[104] United States v. Ford, 23 M.J. 331 (C.M.A. 1987). *But see* United States v. Williams, 37 M.J. 972 (A.C.M.R. 1993) (court stated in dicta that when accused reasonably raises defense of innocent ingestion, this trumps the presumption of wrongfulness and the accused must be found not guilty as a matter of law unless the government introduces additional evidence to establish wrongfulness).

[105] Under AR 15-6, *supra* note 18, para. 3-6c(6), these statements are admissible unless they were obtained by unlawful coercion or inducement likely to affect the statements' truth. In many commands, a common practice is to read Article 31 rights to any soldier who tests positive for illegal drugs. UCMJ art. 31 (1988). The recorder should introduce any incriminating statements made by such soldiers.

[106] For general guidance on defending a urinalysis court-martial, *see* Joseph J. Impallaria, Jr., *An Outline Approach to Defending Urinalysis Cases*, ARMY LAW., May 1988, at 27.

[107] In some commands, an admission of drug use before a board may constitute, as a practical matter, a virtually certain discharge recommendation by the board.

[108] Some commands will have "standing boards" of the type recommended by AR 135-178, *supra* note 4, para. 2-13a. Others will use boards only for one or two individual cases.

Attacking the Chain of Custody

Challenging the collection procedures used by the unit conducting the test is sometimes an effective defense. Failures by the unit to ensure that proper testing procedures were followed[109] can result in serious questions about the reliability of a facially valid test. If the defense points out mistakes or omissions in the collection procedures and the respondent denies drug use, the board may find that the government has not met its burden of proof. This is especially true if the recorder is not prepared to rebut the defense allegations with testimony demonstrating that proper chain of custody procedures were employed.

Army Regulation 600-85 establishes the urine collection procedures.[110] In addition to these regulatory requirements, individual commands may have their own written standard operating procedures; if so, the respondent's counsel should review them.

While minor errors or omissions may not cause a sample to be found inadmissible,[111] many board members are uncomfortable with a failure to meet regulatory requirements. A respondent's counsel who senses a cavalier attitude toward the regulation on the part of the UDAC, the observer, or the recorder, may be able to exploit this posture. Most board members are senior commissioned officers who often view regulations as binding authority.

The respondent's counsel should exploit gross errors in the chain of custody.[112] However, for tactical reasons, respondent's counsel may decide not to challenge the admissibility of a test in advance of the proceedings, unless the respondent's counsel is fairly certain that the error is so egregious that the Staff Judge Advocate will advise the convening authority to halt the separation action. Challenging the test's admissibility at the board hearing may be more effective. Another variation of this tactic is not to object to the actual admissibility of the results, but then present evidence during the respondent's case that will cause the board to question the weight to be given the test. This can produce especially good results if an ill-prepared recorder simply has introduced the litigation packet, without calling the UDAC or the observer, and apparently has no rebuttal witnesses available on the chain of custody issue.

Disproving Wrongful Use

Showing that the respondent's use of drugs was not wrongful sometimes is a successful defense. The respondent may allege that his or her positive urinalysis test resulted from passive inhalation or innocent ingestion of drugs. In other cases, the respondent simply may deny any use of illegal drugs but not specifically recall an instance in which he or she could have inhaled or ingested the drugs without knowledge.[113]

The respondent's counsel must analyze the respondent's allegations and determine how best to present them or, if they are not believable, whether to present them at all. The respondent's counsel also may want to determine if expert testimony or literature is available to support the soldier's allegations.

Passive Inhalation[114]

The respondent may allege that he or she passively inhaled drugs when in a room with others who were smoking the drugs.[115] Typically, this defense is raised when the soldier is charged with use of marijuana,[116] but it also may be raised in cocaine cases.[117] This type of defense raises several problems.

A soldier who passively inhales a drug is unlikely to absorb sufficient quantities of the drug to test positive during a urinalysis test unless he or she was in a very confined area (such

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[109] *See* AR 600-85, *supra* note 8, app. E.

[110] *Id.*

[111] *See supra* note 87 and accompanying text.

[112] *Id.*

[113] In these cases, the respondent's counsel also may want to attack the chain of custody of the urine sample, particularly if the unit apparently violated urinalysis testing procedures.

[114] To prepare this portion of the article, the authors relied on the research of Major Daniel Poling, Headquarters, Department of the Army, Office of The Judge Advocate General, Personnel Plans and Training Office. The authors greatly appreciate his assistance.

[115] *See* Anderson, *supra* note 17, at 25.

[116] Mario Perez-Reyes, et al., *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 34 CLINICAL PHARMACOLOGY & THERAPEUTICS 36 (July 1983) [hereinafter Perez-Reyes study]; Edward J. Cone & Rolley E. Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana*, 37 CLINICAL PHARMACOLOGY & THERAPEUTICS 247 (1986); Edward J. Cone, et al., *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Level of Delta-9-Tetrahydrocannabinol*, 11 J. ANALYTIC TOXICOLOGY 89 (1987) [hereinafter Cone study].

[117] R.C. Baselt, et al., *Passive Inhalation of Cocaine*, 37 CLINICAL CHEMISTRY 2160 (1991).

as an automobile)[118] for a significant amount of time.[119] The soldier's allegation will be even less plausible if his or her urine contained a large quantity of drug metabolites.[120] The allegation also will not be believable if the passive inhalation occurred a significant amount of time before the urine test.[121]

Another problem with passive inhalation is that it may not amount to a defense. A soldier who voluntarily and knowingly remains in an area permeated with drug smoke may be guilty of wrongful use of drugs.[122]

The respondent's counsel must carefully scrutinize claims of passive inhalation. If the board finds that the respondent's testimony concerning passive inhalation is implausible or unbelievable, the members may, without hesitation, label the respondent a liar and recommend discharge, under other than honorable conditions.

Innocent Ingestion

The respondent may allege that he or she innocently ingested drugs that someone surreptitiously placed in the respondent's drink or food. Typically this defense is used in cocaine[123] and marijuana cases,[124] although it can apply to any drug use. Depending on the respondent's allegations, experts frequently will testify that this defense is plausible.

Allegations of innocent ingestion of marijuana (the "brownie defense") pose several problems. Delta 9 tetrahydrocannabinol, the main psychoactive ingredient of marijuana, is released only when the marijuana leaves are heated over 300 degrees Fahrenheit by burning or baking. THC metabolites appear in urine more slowly when marijuana is eaten, rather than smoked, and remain in the body longer.[125] Defense counsel should carefully scrutinize claims of innocent ingestion of marijuana.

Allegations of innocent ingestion of cocaine pose fewer problems. Cocaine is soluble in soda and other drinks and need not be heated to release its active ingredients.[126] However, the respondent's counsel should ascertain when the passive ingestion may have occurred. No matter how ingested, cocaine generally will stay in a soldier's body only for approximately two to four days.[127] The defense of innocent cocaine ingestion probably will be successful only if the ingestion occurred within a few days of the urinalysis test.

Some soldiers allege that they unwittingly ingested cocaine when drinking coca leaf tea. While this type of ingestion is possible,[128] it does not amount to a defense, because the *Federal Schedules of Controlled Substances* prohibit ingestion of coca leaf tea.[129]

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[118] In the Perez-Reyes study, *supra* note 116, the subjects were passively exposed to marijuana smoke in a small unventilated room (8' X 8' X 10') and a medium sized station wagon. In the Cone study, *supra* note 116, the subjects were passively exposed to marijuana smoke in a small unventilated room (7' X 8' X 8'). Goggles were worn to minimize eye irritation.

[119] In the Perez-Reyes study, *supra* note 116, two tests were conducted in which two subjects were passively exposed to marijuana smoke for one hour. In a later test, two subjects were passively exposed to marijuana smoke for one hour on three consecutive days. In the Cone study, *supra* note 116, three tests were conducted in which a total of seven subjects were passively exposed to marijuana smoke for one hour on six consecutive days.

[120] In the Perez-Reyes study, *supra* note 116, 76 urine samples were collected from the subjects passively exposed to marijuana smoke. Only two samples tested slightly above 20 ng/ml on a screening test. In the Cone study, *supra* note 116, the samples collected from the subjects tested between 10 to over 100 ng/ml on a radioimmunoassay test and between 0 and 87 ng/ml on a gas chromatography/mass spectroscopy test.

[121] In the Perez-Reyes study, *supra* note 116, the urine samples were collected within 24 hours of passive exposure. In the Cone study, *supra* note 116, all of the urine samples were collected within ten days after the last exposure.

[122] UCMJ art. 112a (1988); *see also* United States v. Mance, 26 M.J. 244 (C.M.A. 1988) (in court-martial for use of illegal drugs, government must prove that accused knew that he or she was ingesting substance and knew that the substance was of a contraband nature).

[123] *See* United States v. Prince, 24 M.J. 643 (A.F.C.M.R. 1987); United States v. Scaff, 29 M.J. 60 (C.M.A. 1989); United States v. Sparks, 29 M.J. 52, 57 (C.M.A. 1989).

[124] *See* United States v. Ford, 23 M.J. 331 (C.M.A. 1987); United States v. Causey, 37 M.J. 308 (C.M.A. 1993).

[125] Anderson, *supra* note 17, at 27; B. Law et al., *Forensic Aspects of the Metabolism and Excretion of Cannabinoids Following Oral Ingestion of Cannabis Resin*, 36 J. PHARMACY & PHARMACOLOGY 289 (1984); A. Ohlsson et al., *Plasma Delta-9-tetrahydrocannabinol Concentrations and Clinical Effects After Oral and Intravenous Administration and Smoking*, 28 CLINICAL PHARMACOLOGY & THERAPEUTICS 409 (1980).

[126] *Scaff*, 29 M.J. at 62; R.C. Baselt & R. Chang, *Urinary Extraction of Cocaine and Benzoylecgonine Following Oral Ingestion in a Single Subject*, 11 J. ANALYTICAL TOXICOLOGY 81 (1987).

[127] *See supra* note 12.

[128] Mahmoud A. Elsohly et al., *Coca Tea and Urinalysis for Cocaine Metabolites*, 10 J. ANALYTICAL TOXICOLOGY 256 (1986).

[129] 21 C.F.R. § 1308.12(4) (1994). *See* Anderson, *supra* note 17, at 27.

The respondent also may allege that he or she unwittingly absorbed cocaine by handling currency contaminated with cocaine.[130] Although traces of cocaine have been found on currency, which is often used to snort cocaine,[131] the amount of cocaine that can be absorbed in this manner is minimal.[132]

If the respondent's urine tested positive for opiates, the respondent may allege that he or she innocently ingested opiates by eating baked goods containing poppy seeds (the "poppy seed defense"). The poppy plant yields not only illegal opiates—such as heroin—and controlled drugs—such as codeine and morphine—but also lawful substances—such as poppy seeds. When one ingests poppy seeds, the body produces small amounts of the same metabolites produced by morphine and codeine.[133] However, the amounts produced are usually well below the current cut-off level for reporting a urine sample positive for opiates.[134] Furthermore, the poppy seed defense will not work if the respondent tested positive for heroin, because poppy seeds will not cause a positive heroin result.[135]

Closely related to the defense of innocent ingestion is the defense of innocent inhalation. For example, the respondent may claim that he or she innocently inhaled cocaine surreptitiously placed in the respondent's cigarette. However, this allegation is unlikely to be true, because cocaine ordinarily does not vaporize and will not pass through a filtered cigarette.[136] Defense counsel should carefully scrutinize innocent inhalation claims as well.

A soldier who alleges innocent ingestion is often not believed.[137] The board may find it unlikely that someone would surreptitiously place drugs, which are often quite expensive, in the respondent's food or drink, knowing that the respondent may be punished as a result. However, an innocent ingestion defense may be successful if supported by believable testimony from the respondent or other witnesses. This is especially true if the defense produces testimony that the respondent is an excellent soldier as well as scientific studies supporting the defense. An innocent ingestion defense may be particularly effective if the recorder is unprepared to produce expert testimony to rebut it.

The Rehabilitation Defense

In some cases, the best defense strategy[138] may be for the respondent to admit to the wrongful use and offer evidence of successfully completing some type of drug rehabilitation treatment program. In some commands, this approach may be disastrous for the respondent.[139] However, in other commands, strong evidence of rehabilitation may produce favorable results, particularly if the respondent has a better than average record, strong character witnesses, and has completed a somewhat rigorous treatment program. Respondent's counsel should attempt to have a witness from the program available to testify,[140] at least telephonically,[141] as well as documentary evidence, if it exists, of the soldier's performance in the program. Lastly, it may be appropriate to introduce at least some evidence of the respondent's civilian job performance to show

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[130] *See* United States v. Smith, 34 M.J. 200 (C.M.A. 1992).

[131] In United States v. U.S. Currency, $30,060.00, 39 F.3d 1039 (9th Cir. 1994), the court cited several studies showing that between 75% to 97% of United States currency is contaminated with cocaine.

[132] *See* Mahmoud A. Elsohly, *Urinalysis and Casual Handling of Marijuana and Cocaine*, 15 J. ANALYTICAL TOXICOLOGY 46 (1991); *see also* R.C. Baselt et al., *On the Dermal Absorption of Cocaine*, 14 J. ANALYTICAL TOXICOLOGY 383 (1990).

[133] Lyle W. Hayes et al., *Concentration of Morphine and Codeine in Serum and Urine After Ingestion of Poppy Seeds*, 33 CLINICAL CHEMISTRY 806 (1987); Anderson, *supra* note 17, at 27; Carl M. Selavka, *Poppy Seed Ingestion as a Contributing Factor to Opiate-Positive Urinalysis Results: The Pacific Perspective*, 36 J. FORENSIC SCIENCES 685 (1991).

[134] The cut-off levels for the screening and confirmatory tests for morphine were recently increased from 300 ng/ml to 4000 ng/ml. This increase was, in part, designed to eliminate the poppy seed defense. Memorandum, Office of the Department of Defense Coordinator for Drug Enforcement Policy and Support, subject: Drug Screen Testing Levels for Opiates (7 Dec. 1993) [hereinafter Drug Screen Testing Levels for Opiates Memorandum]; Memorandum, Office of the Department of Defense Coordinator for Drug Enforcement Policy and Support, subject: Drug Screen Testing Levels for Opiates (12 Oct. 1994). Although obtaining a positive test result for opiates by eating poppy seed products is still possible, such a result is unlikely. Selavka, *supra* note 133.

[135] A positive test result will be reported for heroin only if the confirming test indicates the presence of 10 ng/ml or more of 6-monoacetylmorphine (6-MAM), a metabolite specific for heroin. Drug Screen Testing Levels for Opiates Memorandum, *supra* note 134.

[136] *See* United States v. Perry, 37 M.J. 363 (C.M.A. 1993). While cocaine in the hydrochloride form—the form most often used for "snorting" cocaine—will not vaporize, cocaine in the "crack" form can be vaporized.

[137] For example, in United States v. Ford, 23 M.J. 331 (C.M.A. 1987), the accused was convicted despite his claims that his estranged wife surreptitiously mixed marijuana into his food.

[138] Ethical considerations sometimes may mean that this is the "only" defense strategy, because a lawyer may not offer evidence that the lawyer knows to be false. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 3.3(a)(4) (1 May 1992). Additionally, in many commands, it is a common (and sound) practice for the soldier to be read his or her Article 31 rights and questioned on testing positive for illegal drugs. UCMJ art. 31 (1988). If the soldier makes an incriminating statement after being advised of his or her rights, or has otherwise made incriminating statements that will be admissible at the board proceedings, the defense strategy will be limited accordingly.

[139] In some commands, the respondent's admission of wrongful use of drugs will virtually guarantee a discharge recommendation by the board.

[140] The respondent has the right to call witnesses, if their testimony is not cumulative and if its significance outweighs the delay, expense, or difficulty of obtaining it. AR 15-6, *supra* note 18, para. 5-8b(2); *see also* AR 135-178, *supra* note 4, para. 2-14c.

[141] *See supra* note 33.

a reliable record of attendance and to attempt to prove the soldier's day-to-day conduct has changed since entering rehabilitation.

If counsel employs this defense strategy, great care should be given to the soldier's testimony at the hearing. If the soldier appears only to be sorry that he or she was caught, and not to have genuinely overcome a substance abuse problem, the board will have little difficulty in recommending discharge.

Character Witnesses

The respondent almost always will want to offer evidence of good military character. This evidence not only indicates that the respondent should be retained in the service, it also may demonstrate that he or she would not knowingly use drugs. This evidence may be sufficient to defeat the government's case.[142]

The respondent's counsel should, at a minimum, interview all of the soldiers in the respondent's chain of command to determine if any would be useful as character witnesses. These witnesses can be crucial to the defense; the respondent is much more likely to be retained if the respondent's commander testifies on his or her behalf.[143] Additionally, the respondent's counsel may want to interview other soldiers in the respondent's unit and the respondent's civilian supervisors, friends, and family members.

If witnesses are willing to testify about the respondent's good military character, the respondent's counsel should consider having at least some of them testify in person at the board.[144] These witnesses can not only testify about the respondent's good military character, but also offer opinions as to whether the respondent used drugs or whether the respondent should be retained in the service.[145] Appendix D contains suggested direct examination questions for a character witness.

The respondent's counsel also should be prepared to present statements from the character witnesses.[146] The respondent's counsel may ask for the respondent to obtain these statements. This not only saves the respondent's counsel time, but also gives the respondent a feeling of contributing to the preparation of the case.

Defense-Requested Tests

One method of supporting the respondent's defense is to obtain additional tests. The respondent may want to have a series of additional tests performed on his or her urine sample to ensure that the original test was accurate. The respondent also may want to have a polygraph or hair test conducted to corroborate innocence. The defense may request that the government pay for these tests or the respondent may have to pay for them.

The defense may want the respondent's urine sample retested to ensure that the initial test was accurate. The respondent is entitled to have his or her urine sample retested at government expense, if there is enough sample left to retest.[147] The respondent also is entitled to have a private laboratory retest the sample at the respondent's own expense.[148]

The respondent may want his or her urine sample tested to determine if it was contaminated. One such test used in cocaine cases is a test for the ecgonine methyl ester (EME) metabolite of cocaine. The Department of Defense drug testing laboratories test only for the primary metabolite of cocaine, benzoylecgonine (BZE). However, BZE can be produced by sprinkling raw cocaine into a urine sample. EME, on the other hand, can only be produced in the body. Some experts have argued that the laboratories should test for EME to reduce the possibility of contamination of samples. However, the government is generally not required to test samples for EME.[149] Therefore, any such tests would have to be paid for by the respondent.

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[142] MCM, *supra* note 14, MIL. R. EVID. 404(a)(1); United States v. Vandelinder, 20 M.J. 41, 47 (C.M.A. 1985).

[143] It is not unprecedented for the respondent's commander to recommend retention at a urinalysis board hearing. Because some separation boards are mandatory, a commander who may want to retain a soldier may be required to process that soldier for separation. The requirement to process a soldier for separation does not mean that the commander must recommend separation or that the soldier must be discharged; it only requires that the action be processed through the chain of command to the separation authority for appropriate action. *See* AR 135-178, *supra* note 4, para. 7-11c1 (I03, 1 Oct. 1993).

[144] The respondent has the right to call witnesses if their testimony is not cumulative and if its significance outweighs the delay, expense, or difficulty of obtaining it. AR 15-6, *supra* note 18, para. 5-8b(2); *see also* AR 135-178, *supra* note 4, para. 2-14c.

[145] Because the Military Rules of Evidence do not apply at separation boards, the witnesses may testify about any relevant and material matters. AR 15-6, *supra* note 18.

[146] *Id.* para. 3-6a. *See also* AR 135-178, *supra* note 4, para. 2-15a(4).

[147] AR 600-85, *supra* note 8, para. 10-8a.

[148] *Id.* 10-8b.

[149] At an administrative separation board, the defense is not entitled to government-conducted tests. AR 15-6, *supra* note 18, para. 5-8. Even at a court-martial, the government is not required to test urine samples for EME unless there is some evidence of tampering. *See* United States v. Metcalf, 34 M.J. 1056 (A.F.C.M.R. 1992) (defense had no right to have government test for EME where chain of custody was uncontested); United States v. Thompson, 34 M.J. 287 (C.M.A. 1992) (positive test for BZE was sufficient to support conviction for cocaine use; test for EME was unnecessary). *But see* United States v. Mack, 33 M.J. 251 (C.M.A. 1991) (test results inadequate to support conviction where test for BZE was positive and test for EME was negative).

The respondent may request blood or DNA tests to prove that he or she did not provide the sample which tested positive. However, as in the case of EME tests, the government generally is not required to perform these tests.[150]

The respondent may request a polygraph to prove that he or she did not use drugs. Although polygraph test results are inadmissible without the consent of the respondent and the recorder,[151] the defense may have a constitutional right to introduce favorable polygraph results.[152] If the soldier can afford it, he or she should take a private polygraph before submitting to a government polygraph. If the results of the private polygraph are not favorable, they will be protected by the attorney-client privilege.[153]

The respondent also may want to have his or her hair analyzed to disprove drug use. Because drugs are deposited in hair over time, it can create a record of the respondent's use or abstinence from use of drugs.[154] Unfortunately, hair analysis generally cannot disprove a one-time use of drugs.[155]

If the respondent took other urinalysis tests that yielded negative results, the respondent's counsel should attempt to obtain these results[156] and consider presenting them to the board.[157] These tests will be especially relevant if they were administered at or near the time of the positive test on which the board action is based.[158] If the respondent took drug tests administered by a civilian employer, the respondent's counsel should consider obtaining the results of these tests as well and presenting them to the board.[159]

Conclusion

Urinalysis cases can be complex. Neither the government nor the defense should be satisfied with a paper case where the test results and related documents are the only matters submitted. Both sides should be prepared to present live or telephonic testimony.

Administrative separation board members will differ greatly from organization to organization. It is just as important to know the members of a separation board as it is to know the judge in a criminal trial. Counsel for both sides should attempt to discover all they can about the reputation and experience of the board members prior to the hearing.

Thorough preparation is essential to successfully prosecute or defend a urinalysis case. This article may assist in that preparation. However, because the facts of each case differ, the suggestions offered here should only serve as a point of departure.

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[150] AR 15-6, *supra* note 18, para. 5-8. The government also is not required to perform these tests at a court-martial unless there are discrepancies in the collection or testing of the sample. United States v. Robinson, 39 M.J. 88 (C.M.A. 1994).

[151] AR 15-6, *supra* note 18, para. 3-6c(2). *See also* MCM, *supra* note 14, MIL. R. EVID. 707 (polygraph results are inadmissible at a court-martial).

[152] United States v. Williams, 39 M.J. 555 (A.C.M.R. 1994), *cert. of review filed,* 39 M.J. 408 (C.M.A. 1994) (accused had constitutional right to establish foundation for admissibility of favorable polygraph evidence at a court-martial).

[153] MCM, *supra* note 14, MIL. R. EVID. 502.

[154] *See* Samuel J. Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10; Note, *Hair Analysis—Overcoming Urinalysis Shortcomings*, ARMY LAW., Feb. 1990, at 69.

[155] *See* United States v. Nimmer, 39 M.J. 924 (N.M.C.M.R. 1994), *petition for review granted,* 40 M.J. 299 (C.M.A. 1994).

[156] Under DOD DIR. 1010.1, *supra* note 91, encl. 3, para. H3a, the respondent or respondent's counsel may obtain the underlying data related to a negative test result. However, if the respondent offers such a negative test result, the recorder also may obtain the underlying data. *Id.* Unfortunately for the respondent, this data actually may reveal the presence of drugs or drug metabolites, although at a level below the Department of Defense cut off for reporting the test positive.

[157] Negative test results taken at or near the time of the respondent's alleged drug use almost are certainly admissible at an administrative separation board. *See* AR 15-6, *supra* note 18, para. 3-6a. *But see* United States v. Johnston, 41 M.J. 13 (C.M.A. 1994) (in a court-martial, military judge properly excluded defense evidence of a negative test taken three days after alleged marijuana use because the test result would have been too confusing).

[158] Arguably, negative test results would be irrelevant and, therefore inadmissible at the board unless they were taken at or near the time of the positive test. *See* United States v. Jones, 30 M.J. 898 (A.F.C.M.R. 1990) (at a court-martial, military judge properly excluded defense evidence of negative urinalysis test administered six months after the period of charged drug use). However, because many drugs are addictive, even tests administered long before or after the positive test probably would be admissible at an administrative separation board. *See* AR 15-6, *supra* note 18, para. 3-6a.

[159] Unfortunately, the respondent's counsel may not compel production of such tests. *See* AR 15-6, *supra* note 18, para. 5-8b.

APPENDIX A

SAMPLE FINDINGS AND SENTENCING WORKSHEET, ENLISTED BOARD

IN COMPLETING THIS WORKSHEET, LINE THROUGH ALL INAPPLICABLE PARENTHETICALS. WHEN ANNOUNCING THE FINDINGS AND RECOMMENDATIONS, DO NOT READ THE LANGUAGE IN BOLD PRINT.

The board finds that the allegation of commission of a serious offense, specifically the use of cocaine by the respondent, Private Richard J. Schmedlap, on or about 21 January 1995, (is) (is not) supported by a preponderance of the evidence.

IF YOU FIND THAT THE ABOVE ALLEGATION IS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE, STOP HERE. OTHERWISE, CONTINUE AS FOLLOWS:

The board finds that the above finding (does) (does not) warrant separation.

The board recommends that Private Schmedlap be: (retained in the service; the board believes that he can perform the following type of duty satisfactorily:_____.)

(separated because of misconduct.)

IF YOU RECOMMEND THAT THE RESPONDENT SHOULD BE RETAINED, STOP HERE. OTHERWISE, CONTINUE AS FOLLOWS:

The board recommends that Private Schmedlap be furnished:

(an honorable discharge certificate)

(a general discharge certificate)

(a discharge order under other than honorable conditions).

APPENDIX B

SUGGESTED DIRECT EXAMINATION QUESTIONS: OBSERVER

1. Please state your name, rank, social security number, and organization.
2. What is your duty position?
3. Do you know the respondent?
4. Did you serve as an observer in a urinalysis test on (date)?
5. Who was the Unit Alcohol and Drug Coordinator for this test?
6. Who ordered this test?
7. Why did he/she order this test? (Was it a unit-wide inspection?)
8. Did the respondent participate in this test?
9. Please describe the procedures used at a urinalysis test.
10. Were these procedures followed during the test on (date)?
11. Were the urine specimen bottles labeled prior to the test?
12. Was the *DD Form 2624, Specimen Custody Document*, properly prepared prior to the test?
13. Was a urinalysis ledger used during the test?
14. Did the Unit Alcohol and Drug Coordinator give the respondent his/her specimen bottle in your presence?
15. Did the respondent verify the information on the bottle label by signing his payroll signature in the ledger and initialing the bottle label?
16. Did you directly observe the respondent urinating into the bottle?
17. Please describe how you did this.
18. Are you sure the bottle contained nothing but the respondent's urine?
19. Did the respondent give you the bottle?
20. Did you return the bottle to the Unit Alcohol and Drug Coordinator, initial the bottle label, and sign the Specimen Custody Document?
21. Did the respondent initial the bottle label and sign the Specimen Custody Document?
22. Was the bottle sealed? Who did this?
23. Did you see what happened to the bottle once it left your custody? Please describe what was done.
24. Did your unit receive a report from the laboratory that the respondent's sample tested positive for (drug)?
25. I hand you exhibit 1. Is that the report?
26. Is that your signature on the Specimen Custody Document contained in the report?
27. Does that report indicate that the respondent used (drug) on or about (date)?

APPENDIX C

SUGGESTED DIRECT EXAMINATION QUESTIONS: UNIT ALCOHOL AND DRUG COORDINATOR

1. Please state your name, rank, social security number, and organization.
2. Are you the Unit Alcohol and Drug Coordinator for your unit?
3. What, if any, training did you receive for this position?
4. Do you know the respondent?
5. Did you supervise a urinalysis test on (date)?
6. Who ordered this test?
7. Why did he/she order this test? (Was it a unit-wide inspection?)
8. Did the respondent participate in this test?

9. Please describe the procedures used at a urinalysis test.
10. Are these procedures described in *Army Regulation 600-85*?
11. I hand you exhibit 3. Is this a copy of the applicable provisions of *Army Regulation 600-85*?
12. Were the procedures described in this regulation followed during the test on (date)?
13. How did you label the urine specimen bottles prior to the test?
14. Please describe how you prepared the *DD Form 2624, Specimen Custody Document*, prior to the test.
15. Please describe how you prepared the urinalysis ledger prior to the test.
16. Who was the observer for the respondent's test?
17. Did you give the respondent his/her specimen bottle in the presence of the observer?
18. Did the respondent verify the information on the bottle label by signing his/her payroll signature in the ledger and initialing the bottle label?
19. As far as you know, did the observer properly observe the respondent urinating into the bottle?
20. Did the observer return the bottle to you, initial the bottle label, and sign the Specimen Custody Document?
21. Did you initial the bottle label and sign the Specimen Custody Document?
22. Please describe how you packaged and mailed the respondent's sample to the laboratory.
23. Do you know what happened to the sample once it left your custody? Do you know whether the sample was received at the laboratory?
24. Are you familiar with the laboratory's testing procedures? How did you become familiar with them? What are these procedures?
25. Did you receive a report from the laboratory that the respondent's sample tested positive for (drug)?
26. I hand you exhibit 1. Is that the report?
27. Is that your signature on the Specimen Custody Document contained in the report?
28. When and how did you receive this report?
29. Did you subsequently receive a litigation packet concerning the respondent's positive drug test from the laboratory?
30. I hand you exhibit 2. Is that the litigation packet?
31. Please describe what that packet contains and what it indicates.
32. Does that packet indicate that the respondent used (drug) on or about (date)?

APPENDIX D

SUGGESTED DIRECT EXAMINATION QUESTIONS: CHARACTER WITNESS

1. Please state your name, (rank), social security number, and organization/address.
2. What is your (duty position) (job)?
3. Do you know the respondent?
4. How long have you known the respondent?
5. In what capacity have you known the respondent?
6. Have you supervised the respondent?
7. Have you had contact with the respondent (off-duty) (outside of the workplace)?
8. Have you ever been to (summer camp) (annual training) (____) with the respondent?
9. What is your opinion of the respondent's (duty) (work) performance?
10. Could you give some examples of his/her (duty) (work) performance?
11. In your opinion, does the respondent have good military character?
12. Could you give some examples of his good military character?
13. Have you ever seen any indication that the respondent uses drugs?
14. Were you surprised by the report that the respondent's urine tested positive for drug use? Why?
15. In your opinion, did the respondent use drugs on (date)?
16. Do you believe that the respondent should be retained in the service?
17. If the respondent is discharged, what type of discharge do you believe he should receive?

Analysis of the 1995 Amendments to the *Manual for Courts-Martial*

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Introduction

The 1995 amendments to the *Manual for Courts-Martial* (*Manual*),[1] United States, are expected to be signed by the President as an Executive Order (EO) in April/May 1995.

These 1995 amendments resulted from the 1993 and 1994 annual reviews of military justice conducted by the Joint Service Committee (JSC) on Military Justice. The JSC consists of representatives from each of the five services. It assists the President in his responsibilities under Article 36, Uniform Code of Military Justice (UCMJ) to ensure that courts-martial use "the principles of law and rules of evidence generally recognizable in the trial of criminal cases in US district courts."[2] The JSC's annual review results in draft amendments to the *Manual*. Some proposals reflect new United States Supreme Court decisions. Other suggested changes are based on ideas generated by the JSC's own members. Finally, some amendments to the *Manual* result from suggestions from the field or members of the public. After staffing through the Department of Defense (DOD), and approval by the Office of Management and Budget and the Departments of Justice and Transportation, the President signs the changes to the *Manual* as an EO.[3]

This article analyzes the 1995 amendments in five parts. It first discusses a change to the Preamble portion of the *Manual*. Second, the article discusses amendments to the R.C.M. Third, it examines changes to the MRE. Fourth, it looks at changes to part IV of the *Manual*. Finally, it analyzes a number of miscellaneous changes to the discussion and analysis portions of the *Manual*.

Amendments to the Preamble

The following change was made to paragraph 4, "Structure and application of the Manual for Courts-Martial":

> The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Parts I-V). The Manual shall be applied consistent with the purpose of military law.
>
> The Manual shall be identified as "Manual for Courts-Martial, United States (19xx edition)." Any amendments to the Manual made by Executive Order shall be identified as "19xx Amendments to the Manual for Courts-Martial, United States."

This 1995 amendment to paragraph 4 of the Preamble eliminates the practice of identifying the *Manual* by a particular year by dropping the year "1984" from the title. As long as the *Manual* was published in its entirety sporadically (*e.g.*, 1917, 1921, 1928, 1949, 1951, 1969, and 1984), with amendments to it published piecemeal, it was logical to identify the *Manual* by the calendar year of publication, with periodic amendments identified as "Changes" to the *Manual*. The more frequent publication of a new edition of the *Manual*, however, means that it is more appropriately identified by the calendar year of edition. Additionally, amendments made in a particular calendar year will be easily identified because the complete EO containing those amendments will be published as a *Manual* appendix.

Amendments to the R.C.M.

The President's EO made the following changes to the R.C.M.:

a. R.C.M. 810(d) is amended to conform with changes made to Article 63, UCMJ, by the National Defense Autho-

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[1] MANUAL FOR COURTS-MARTIAL, United States (1994 ed.) [hereinafter MCM].

[2] UCMJ art. 36 (1988).

[3] Not all aspects of any change to the *Manual* are part of the EO. The President must approve any amendments to parts I-V of the MCM. Consequently, any change to the Rules for Courts-Martial (R.C.M.), Military Rules of Evidence (MRE), or offenses portion of the *Manual* are part of the EO. The accompanying "Discussion" or "Analysis," however, is not authoritative and is not part of the EO. An EO is not required, for example, to change most of the appendices in the *Manual*.

In the past, an EO was identified as a "Change" to the *Manual*, with the last EO being "Change 7." However, the 1995 amendments to the *Manual* break with prior practice because they are not designated as "Change 8" but as the "1995 Amendments." *See infra* the text discussing the 1995 amendments to the "Preamble."

rization Act for Fiscal Year 1993.[4] The new rule provides that an offense on which a rehearing, new trial, or other trial has been ordered may not have an approved sentence more severe than the sentence approved by the convening authority following the earlier trial or hearing. The only exception is if the sentence prescribed for the offense is mandatory. Consequently, when a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority is the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited above, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an "other trial," no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving a mandatory punishment or one otherwise considered capital.

The 1995 amendments to R.C.M. 810(d) also provide that if the earlier sentence was approved in accordance with a pretrial agreement, and at the rehearing the accused fails to comply with this agreement, then the convening authority may approve any sentence not greater than that adjudged at the earlier court-martial.

b. R.C.M. 924(a) is amended so that the court members may reconsider any finding reached by them before such finding is announced in "open session." This means that the members may reconsider any findings reached in closed session but not yet announced in open court.

c. R.C.M. 924(c) is amended so that in judge alone cases, the military judge may reconsider any finding of guilty at any time before announcement of sentence. The judge also may reconsider the "guilty finding" of a not guilty by reason of lack of mental responsibility at any time before announcement of sentence or authentication of the record of trial in the case of a complete acquittal.

d. R.C.M. 1003(b)(9) is deleted. The result is that the punishment of confinement on bread and water or diminished rations is no longer authorized as a court-martial punishment. This punishment originally was intended as an immediate, remedial punishment. The length of time that elapsed from an announced sentence containing this punishment and its approval by the convening authority, however, undercut this intent. Consequently, it was abolished as a court-martial punishment. Note that the punishment remains permissible for nonjudicial punishment.

e. R.C.M. 1009 is amended to prevent a sentencing authority from reconsidering a sentence announced in open court. There are two exceptions, however, to this general rule. First, if the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, then the court that reached this sentence may reconsider it, and may increase the sentence on reconsideration. Second, if the sentence announced in open court is greater than the maximum permissible punishment for the offense or the jurisdictional limitation of the court, then the sentence may be reconsidered after announcement.

The amendments to R.C.M. 1009 also now permit a military judge to clarify an announced sentence that is ambiguous. This may be done at any time prior to action of the convening authority on the case, using the new procedure set out in subsection (e) of the rule. Subsection (d) of R.C.M. 1009 also permits the convening authority to return an ambiguous sentence for clarification, or take action consistent with R.C.M. 1107.

f. R.C.M. 1106(d)(3) adds a new subsection (B) that requires the Staff Judge Advocate's (SJA) recommendation to inform the convening authority of any clemency recommendation made by the sentencing authority in announcing a sentence, absent a written request by the defense to the contrary. Prior to this amendment, an accused was responsible for informing the convening authority of any such recommendation. This change to R.C.M. 1106 recognizes that any clemency recommendation is so closely related to the sentence that an SJA should be responsible for informing the convening authority of the recommendation. The accused remains responsible for informing the convening authority of other recommendations for clemency, including those made by the military judge in a trial with member sentencing and those made by individual members.[5]

g. R.C.M. 1107(d) is amended to comply with Congress's recent changes to Article 57(e), UCMJ.[6] It permits a military sentence to be served consecutively, rather than concurrently, with a civilian or foreign sentence. Consequently, a new subparagraph (3) is added to the rule to cover the situation of an accused who, while in custody of a state[7] or foreign country, is temporarily returned by that state or foreign country to the armed forces for trial by court-martial. If the accused receives a sentence to confinement as a result of this court-martial, the convening authority may postpone service of a sentence to confinement by a court-martial, without the consent of the

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[4] Pub. L. No. 102-484, 106 Stat. 2315, 2506 (1992).

[5] *See* United States v. Clear, 34 M.J. 129 (C.M.A. 1992); MCM *supra* note 1, R.C.M. 1105(b)(4).

[6] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2505 (1992). *See also* Interstate Agreement on Detainers Act, 18 U.S.C. App. III.

[7] The term "state" means a state of the United States, the District of Columbia, a territory, and a possession of the United States.

accused, until after the accused has been permanently released to the armed forces by a state or foreign country. This permits the return of the accused to the state or foreign country so that he or she can serve any period of confinement. It also means that a military sentence will be served consecutively, rather than concurrently, with a civilian or foreign sentence. The discussion following R.C.M. 1107(d)(3) also is amended to note that the convening authority's decision to postpone service of a court-martial sentence to confinement normally should be reflected in the action.

h. R.C.M. 1107(e)(1)(C)(iii) is amended to provide that a rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings. If the convening authority determines a rehearing on sentence is impracticable, however, he or she may approve a sentence of no punishment without conducting a rehearing. Appellate courts have recognized this authority.[8]

i. R.C.M. 1107(f)(2) is amended to allow a convening authority to recall and modify any action after it has been published or after an accused has been officially notified, but before a record has been forwarded for review, as long as the new action is not less favorable to the accused than the prior action. This means that a convening authority is not limited to taking only corrective action, but also may modify the approved findings or sentence provided the modification is not less favorable to the accused than the earlier action. Additionally, in any special court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous aspect of this action at any time before completion of review under R.C.M. 1112. Finally, when so directed by a higher reviewing authority or The Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Articles 64, 66, 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action.

The discussion portion also is amended to note that for purposes of this rule, a record is considered to have been forwarded for review when the convening authority has either delivered it in person or has entrusted it for delivery to a third party over whom the convening authority exercises no lawful control (*e.g.*, the United States mail).

j. R.C.M. 1108(b) is amended to provide that after approving a court-martial sentence, a convening authority may suspend the execution of all or any part of that sentence, except for a sentence of death. Additionally, the general court-martial convening authority over the accused at the time of the court-martial may, when taking the action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned—and any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer, when designated by this Secretary—may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President. Finally, the commander of the accused who has the authority to convene a court-martial of the kind that adjudged the sentence may suspend or remit any part or amount of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial which does not include a bad-conduct discharge, regardless of whether the person acting has previously approved the sentence. The "unexecuted part of any sentence" includes that part which has been approved and ordered executed but which has not actually been carried out.

k. R.C.M. 1201(b)(3)(A) is amended to conform with the language of Article 69(a), as enacted by the Congress in 1989.[9] It provides that notwithstanding R.C.M. 1209—which governs the finality of courts-martial—The Judge Advocate General may, sua sponte or, on application of the accused,[10] vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial which has been finally reviewed, but has not been reviewed either by a Court of Criminal Appeals or by The Judge Advocate General under subsection (b)(1) of this rule. This action by The Judge Advocate General must be on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

Changes to the MRE

a. MRE 311(g)(2) is amended to provide that if the defense makes a substantial preliminary showing that a government agent knowingly and intentionally or with reckless disregard for the truth, included a false statement in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, then the defense, on request, shall be entitled to a hearing. At the hearing, the defense must show by a preponderance of the evidence that the falsity of the evidence was "knowing and intentional" or in reckless disregard for the truth.[11] If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules.

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[8] *See, e.g.*, United States v. Monetesinos, 28 M.J. 38 (C.M.A. 1989); United States v. Sala, 30 M.J. 813 (A.C.M.R. 1990).

[9] Military Justice Amendments of 1989, tit. XIII, sec. 1302(a)(2), National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. 101-89, 103 Stat. 1352 (1989).

[10] Except when the accused has waived or withdrawn the right to appellate review under R.C.M. 1110.

[11] *Accord* Franks v. Delaware, 438 U.S. 154 (1978).

b. MRE 506(e) and (f) are amended so that if classified information arises during a proceeding under MRE 506, the procedures of MRE 505 will be used. Consequently, the amendments to MRE 506 provide that at any time after referral of charges and prior to arraignment, either trial or defense counsel may move for a session under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such motion, or sua sponte, the military judge must hold a pretrial session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under MRE 506 (h), and the initiation of the procedure under MRE 506 (i). Additionally, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial. This new MRE 506(e) is taken from MRE 505(e).

Additionally, subsection (f) provides that after referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this rule, the matter shall be reported to the convening authority. The convening authority may (1) institute action to obtain the information for use by the military judge in making a determination under subdivision (i); (2) dismiss the charges; (3) dismiss the charges or specifications or both to which the information relates; or (4) take other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

Note that Rule 506(f) does not require a finding that failure to disclose the information in question "would materially prejudice a substantial right of the accused." Additionally, dismissal is not required when the relevant information is not disclosed in a "reasonable period of time."

c. MRE 506(h) is amended to prevent defense disclosure of government information unless authorized by the military judge.

d. MRE 506(i) is amended to permit the government to move for an in camera[12] proceeding when any government information that may be subject to a claim of privilege is to be used "at any proceeding." This motion for an in camera proceeding must be supported by affidavits and information (examined only by the judge) showing that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest. In the in camera proceeding, both trial and defense counsel have the opportunity to argue the admissibility of the government information at trial.

If appropriate, the military judge shall enter a protective order to the accused and all other trial participants concerning the disclosure of the information. The accused shall not disclose any information provided under this subdivision unless, and until, such information has been admitted into evidence by the military judge.

Note that under MRE 506(i)(4)(C), government information may be disclosed at trial if the party making the request demonstrates a specific need for any information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the court-martial proceeding. This comports with the Supreme Court's decision in *Brady v. Maryland*.[13]

Finally, unless the military judge makes a written determination that information is subject to disclosure under the standard set forth in MRE 506(i)(4)(C), above, the information may not be disclosed at the court-martial proceeding or otherwise. The military judge specifies in writing any information that he or she determines is subject to disclosure, and the record of the in camera proceeding is sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

Military Rule of Evidence 506(i) also discusses alternatives to full disclosure and sanctions for disclosure. Alternatives to full disclosure are that the government may proffer a statement admitting for purposes of the court-martial any relevant facts such information would tend to prove, or may submit a portion or summary to be used in lieu of the information. In this situation, the military judge shall order that this statement, portion, summary, or some other form of information which the military judge finds to be consistent with the interests of justice, be used by the accused in place of the government information, unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

Regardless of the military judge's rulings under MRE 506(i), information may not be disclosed over the government's objection. Accordingly, MRE 506(i)(4)(F) allows the government to determine whether the information ultimately will be disclosed to the accused. The government's continued objection to disclosure may be at the price of letting the accused go free, in that MRE 506(i)(4)(F) adopts the sanctions available to the military judge under MRE 505(i)(4)(E).[14] Consequently, if the government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests

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[12] Under MRE 506, in camera proceedings are defined as "a session under Article 39(a) from which the public is excluded." MCM, *supra* note 1, MIL. R. EVID. 506.

[13] 373 U.S. 83, 87 (1962).

[14] *See* United States v. Reynolds, 345 U.S. 1, 12 (1952).

of justice require. This order may include (i) striking or precluding all or part of the testimony of a witness; (ii) declaring a mistrial; (iii) finding against the government on any issue as to which the evidence is relevant and necessary to the defense; (iv) dismissing the charges, with or without prejudice; or (v) dismissing the charges or specifications or both to which the information relates.

The amended procedures under MRE 506(i)(4) provide for full disclosure of the government information in question to the accused for purposes of litigating the admissibility of the information in the protected environment of the in camera proceeding (*i.e.*, the Article 39(a) session is closed to the public) and neither side may disclose the information outside the in camera proceeding until the military judge admits the information as evidence in the trial. Note that under MRE 506(i)(4)(E), the military judge may authorize alternatives to disclosure, consistent with a military judge's authority concerning classified information under MRE 505.

e. A new MRE 506(j) is added to provide for government appeal of orders and rulings involving classified information.[15] In a court-martial in which a punitive discharge may be adjudged, the government may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. Additionally, the government may appeal an order or ruling in which the military judge refuses to issue a protective order sought by the United States to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

Changes to the Punitive Articles

a. Paragraph 4c is amended by adding a new subparagraph (4) which recognizes the limited defense of voluntary abandonment. It is based on case law.[16] It now is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime prior to its completion, solely because of the person's own sense that it was wrong. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons (for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance).

Note that a person who is successful in raising the defense of voluntary abandonment still may be guilty of a lesser-included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.

b. Paragraph 30a c(1), is amended to clarify that the intent element of espionage is not satisfied merely because the accused acted without lawful authority.[17] The amended provision now states that "intent or reason to believe" that the information "is to be used to the injury of the United States or to the advantage of a foreign nation" means that the accused acted in bad faith *and* without lawful authority with respect to information that is not lawfully accessible to the public."

c. Paragraph 35 is amended to conform the *Manual* to the changes to Article 111 made by Congress in 1992.[18] New subparagraphs, c(2) and c(3), were added to include vessels and aircraft, respectively. Paragraph 35 also was amended to make punishable actual physical control of a vehicle, aircraft, or vessel while drunk or impaired, or in a reckless fashion, or while one's blood or breath alcohol concentration is in violation of the per se standard of 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath. Note that the creation of this per se standard does not, however, preclude prosecution where no chemical test is taken or even where the results of the chemical tests are *below* the statutory limits, where other evidence of intoxication is available.[19]

A new subparagraph, c(5), also was added to define the concept of actual physical control. This change allows drunk or impaired individuals who demonstrate the ability to operate a vehicle, aircraft, or vessel, to be apprehended if in the vehicle, aircraft, or vessel, but not actually operating it at the time.

Additionally, a new subparagraph, c(9), was added to clarify that to show that the accused caused personal injury, the government must prove proximate causation and not merely cause in fact.[20]

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[15] *See* MCM, *supra* note 1, R.C.M. 908. Note that the subdivision speaks only to government appeals; the defense still may seek extraordinary relief through interlocutory appeal of the military judge's orders and rulings.

[16] See United States v. Schoof, 37 M.J. 96 (C.M.A. 1993); United States v. Rios, 33 M.J. 436 (C.M.A. 1991); United States v. Byrd, 24 M.J. 286 (C.M.A. 1987); United States v. Rios, 32 M.J. 501 (A.C.M.R. 1990); United States v. Miller, 30 M.J. 999 (N.M.C.M.R. 1990); United States v. Walther, 30 M.J. 829 (N.M.C.M.R. 1990).

[17] UCMJ art. 106a (1988). The accused must have acted in bad faith. *See* United States v. Richardson, 33 M.J. 127 (C.M.A. 1991); Gorin v. United States, 312 U.S. 19, 21 n.1 (1941).

[18] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2506 (1992).

[19] *See* United States v. Gholson, 319 F. Supp. 499 (E.D. Va. 1970).

[20] *Accord* United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990). The definition of "proximate cause" is based on United States v. Romero, 1 M.J. 227, 230 (C.M.A. 1975).

Note that a new subparagraph, d(2)(a), adds Article 110 (improper hazarding of a vessel) as a lesser-included offense of drunken operation or actual physical control of a vessel. Another new subparagraph, d(1), adds Article 110 (improper hazarding of a vessel) as a lesser-included offense of reckless or wanton or impaired operation or physical control of a vessel.

Finally, the 1995 amendments to paragraph 35 also clarify that culpability extends to the person operating or exercising actual physical control through the agency of another (*e.g.*, the captain of a ship giving orders to a helmsman).

d. Paragraphs 43a(3) and b(3)(c) are amended by replacing the word "others" with the word "another" in Article 118(3). This conforms the *Manual* to the change Congress made to Article 118(3) in 1992.[21] The provisions now read:

> (3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or
>
> (c) That this act was inherently dangerous to another and showed a wanton disregard for human life;

This 1995 amendment corrects the limiting language —"others"—previously used in Article 118(3).[22]

e. Paragraph 43c(4)(a) is amended to provide that intentionally engaging in an act inherently dangerous to another—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—is murder if the act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm. Examples include throwing a live grenade toward another or others in jest or flying an aircraft very low over one or more persons to cause alarm.

f. Paragraph 45a(a) is amended to make the offense of rape gender neutral and remove the spousal exception under Article 120(a). This conforms the *Manual* to the changes Congress made to Article 120, UCMJ, in 1992.[23] Rape is now defined as sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense.

g. Paragraph 89c is amended to define "indecent" language as that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.[24]

h. The following new paragraph is added after paragraph 103 to create the new offense under Article 134 of self-injury without intent to avoid service.

This offense differs from malingering[25] in that the accused need not have had any intent to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Because it is charged under Article 134, the circumstances of the intentional self-injury must prejudice good order and discipline or discredit the armed forces. Note that it is not required that the accused be unable to perform duties, or that the accused actually be absent from his or her place or duty as a result of the injury. For example, the accused may inflict the injury while on leave or pass. The circumstances and extent of injury, however, are relevant to a determination that the accused's conduct was prejudicial to good order and discipline, or service discrediting.

Note that the injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission which produces, prolongs, or aggravates a sickness or disability. Thus, voluntary starvation which results in a debility is a self-inflicted injury. Similarly, the injury may be inflicted by another at the accused's request.

The maximum punishment for intentional self-inflicted injury is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. The maximum punishment for intentional self-inflicted injury in time of war or in a hostile fire pay zone is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.[26] These 1995 amendments are based on earlier versions of the *Manual* and case law.[27]

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[21] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2314, 2506 (1992).

[22] United States v. Berg, 30 M.J. 195 (C.M.A. 1990).

[23] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2506 (1992).

[24] *See* MCM, *supra* note 1, pt. IV, ¶ 87, if the communication was made in the physical presence of a child.

[25] *See id.* pt. IV, ¶ 40.

[26] The maximum punishment for subsection (1) reflects the serious effect that this offense may have on readiness and morale. The maximum punishment reflects the range of the effects of the injury, both in degree and duration, on the ability of the accused to perform work, duty, or service. The maximum punishment for subsection (1) is equivalent to that for offenses of desertion, missing movement through design, and certain violations of orders. The maximum punishment for subsection (2) is less than the maximum punishment for the offense of malingering under the same circumstances because of the absence of the specific intent to avoid work, duty, or service. The maximum punishment for subsection (2) is equivalent to that for nonaggravated offenses of desertion, willfully disobeying a superior commissioned officer, and nonaggravated malingering by intentional self-inflicted injury.

[27] *See* MANUAL FOR COURTS-MARTIAL, United States, para. 183a (1949); United States v. Taylor, 38 C.M.R. 393 (C.M.A. 1968); United States v. Ramsey, 35 M.J. 733 (A.C.M.R. 1992), *petition granted*, C.M.A., 37 M.J. 25 (1993); *see generally* TJAGSA Practice Note, *Confusion About Malingering and Attempted Suicide*, ARMY LAW., June 1992, at 38.

Changes to the Discussion and Analysis of the R.C.M. and MRE

The 1995 amendments made a number of changes to the discussion and analysis portions of the R.C.M. and MRE. These changes are not part of the EO, because they are "unofficial" explanatory commentary reflecting the intent of the Drafters. They merit discussion, however, because military justice practitioners look to the discussion and analysis portions of the *Manual* for guidance.

a. Subsections 2(B)(ii) and (iii) of the discussion following R.C.M. 202(a) are amended to conform to changes Congress made to Article 3(a) in 1992.[28] Generally, court-martial jurisdiction terminates on discharge or its equivalent. For offenses occurring on or after 23 October 1992, however, a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service. For offenses occurring prior to 23 October 1992, a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service only if the offense was punishable by confinement for five years or more and could not be tried in the courts of the United States or of a state, a territory, or the District of Columbia.

b. The discussion following R.C.M. 203(a) is amended to conform the *Manual* to the current law on in personam jurisdiction. It explains that in general, courts-martial have the power to try any offense under the UCMJ except when prohibited from so doing by the Constitution. The rule enunciated in *Solorio v. United States*[29] is that jurisdiction of courts-martial depends solely on the accused's status as a person subject to the UCMJ, and not on any "service connection."[30]

Normally, the inclusion of the accused's rank or grade will be sufficient to plead the service status of the accused. Ordinarily, no allegation of the accused's armed force or unit is necessary for military members on active duty.[31]

c. Subparagraph (F) of the discussion following R.C.M. 307(c)(3) is amended to explain that pleading the accused's rank or grade along with the proper elements of the offense normally will be sufficient to establish subject-matter jurisdiction. This amendment also was made to conform the discussion to the law announced in *Solorio*.

d. The discussion following R.C.M. 902(d)(2) is amended to clarify that in a proceeding examining a military judge's impartiality, nothing prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject. This will ensure that only matters material to the central issue of the military judge's possible disqualification are considered, and prevents the proceedings from becoming a forum for unfounded opinion, speculation, or innuendo.

e. The discussion following R.C.M. 1003(b)(6) is amended to explain that the punishment of "restriction" does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum limits for each. The sentence adjudged should specify the limits of the restriction.

f. The discussion following R.C.M. 1105(b)(4) is amended by adding the following sentence at the end of the rule to alert the reader that if the sentencing authority makes a clemency recommendation in conjunction with the announced sentence, then R.C.M. 1106(d)(3)(B) controls. This rule requires the SJA to include the clemency recommendation in the recommendation to the convening authority.

g. The discussion following R.C.M. 1107(d)(1) is amended to explain that a sentence adjudged by a court-martial may be approved if it is within the jurisdiction of the court-martial to adjudge and does not exceed the maximum limits prescribed in part IV and chapter X of this part for the offense(s) of which the accused legally has been found guilty.

Additionally, when mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased. Additionally, neither the amount nor duration of the forfeitures may exceed the jurisdiction of the court-martial. When mitigating confinement or hard labor without confinement, the convening authority should use the equivalencies in R.C.M. 1003(b)(6) and (7), as appropriate. One form of punishment may be changed to a less severe punishment of a different nature, as long as the changed punishment is one which the court-martial could have adjudged. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for six months (but not vice versa). A pretrial agreement also may affect what punishments may be changed by the convening authority.

h. The discussion following R.C.M. 1107(d)(2) is amended to clarify that because court-martial forfeitures are a loss of

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[28] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

[29] 483 U.S. 435 (1987).

[30] O'Callahan v. Parker, 395 U.S. 258 (1969), held that an offense under the Code could not be tried by court-martial unless the offense was "service connected." *Solorio* overruled *O'Callahan*.

[31] *See* MCM, *supra* note 1, R.C.M. 307, regarding required specificity of pleadings.

entitlement to pay, they take precedence over all debts. This is new, and conforms the *Manual* to the DOD pay manual.[32]

i. The discussion following R.C.M. 1113(d)(2)(A)(iii) is amended to provide that the convening authority's decision to postpone service of a court-martial sentence to confinement normally should be reflected in the action.

j. The discussion following R.C.M. 1201(b)(1) is amended to provide that a case forwarded to a Court of Criminal Appeals under this subsection is subject to review by the Court of Appeals for the Armed Forces on petition by the accused under Article 67(a)(3) or when certified by The Judge Advocate General under Article 67(a) (2).

k. The discussion following R.C.M. 1301(d)(1) is amended to provide that the maximum penalty which can be adjudged in a summary court-martial is confinement for thirty days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade, except for the additional limits on enlisted persons serving in pay grades above the fourth enlisted pay grade. This change was needed because the 1995 amendments to the *Manual* deleted the punishment of confinement on bread and water or diminished rations as an authorized punishment. Prior to this change, a summary court-martial sentence could include confinement for three days on bread and water or diminished rations.

Additionally, the discussion explains that a summary court-martial may not suspend all or part of a sentence, although the summary court-martial may recommend to the convening authority that all or part of a sentence by suspended. If a sentence includes both reduction in grade and forfeitures, the maximum forfeiture is calculated at the grade to which reduced. Finally, the summary court-martial should ascertain the effect of Article 58a[33] in that armed force.

l. The analysis accompanying paragraph 89c is amended by adding a second sentence. It incorporates a test for "indecent language" adopted by the Court of Military Appeals in *United States v. French*.[34] The term "tends reasonably" is substituted for the term "calculated to," to avoid the misinterpretation that indecent language is a specific intent offense.

Conclusion

The 1995 amendments to the *Manual* are the latest result of the JSC's annual reviews of military justice. The JSC is now working on its 1994-95 review of military justice, which will become the 1996 amendments to the *Manual*.

All military justice practitioners are encouraged to submit comments about the *Manual* or UCMJ, or proposals for future changes to both, to the Criminal Law Division, Office of The Judge Advocate General, for possible referral to the JSC.

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[32] DEP'T OF DEFENSE, MILITARY PAY AND ALLOWANCES ENTITLEMENT MANUAL, vol. 7, pt. A, para. 70507a (31 Aug. 1992).

[33] Article 58a (10 U.S.C. § 858a) provides that an enlisted member above pay grade E-1 sentenced to confinement, a dishonorable or bad-conduct discharge, or hard labor without confinement, is automatically reduced to the lowest pay grade, regardless of whether that member's sentence, as announced or approved, contained any reduction in rank.

In the Army, Article 58a operates as written. The Navy, Air Force, and Coast Guard, however, have administratively mitigated its effect.

[34] 31 M.J. 57, 60 (C.M.A. 1990).

Environmental Aspects of Overseas Operations

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Introduction

Judge advocates (JAs) must advise commanders and train soldiers regarding environmental law issues in overseas military operations. Effective environmental legal advice and training require the appreciation of four prerequisites. First, JAs must recognize environmental law issues that other officers and officials may not have considered. Second, JAs must know where to find answers relative to environmental law issues. Third, JAs must provide advice and make training relevant across the entire operational spectrum. Finally, JAs must recognize and understand the application of the four categories of environmental law that bear on overseas operations:

(1) Domestic Environmental Law;
(2) Laws of Host Nations;
(3) Traditional Law of War; and
(4) Peacetime Environmental Law.

This article is designed to assist JAs in satisfying the fourth and most technical prerequisite.

The Imperative of Environmental Law

During the past several decades, the importance of protecting the environment has become increasingly obvious. The international community remains vigilant in its oversight of the environmental consequences of military operations. Military lawyers must ensure that leaders are aware of both the rules and of the importance of complying with these rules. Failure to comply with environmental law can jeopardize current and future operations, generate domestic and international criticism, produce costly litigation, and even result in personal liability of both the leader and the individual soldier.

The setting, force composition, and nuanced nature of contemporary military operations magnify the need for military lawyers to achieve a high degree of sophistication relative to environmental protection laws. An understanding of the following four categories of law will satisfy this requirement.

Four Categories of Law

Domestic Environmental Law

Statutes

Domestic law generally has no extraterritorial application during overseas operations. For instance, the Endangered Species Act (ESA),[1] and the National Environmental Policy Act (NEPA)[2] normally are not considered to have extraterritorial application.[3] For a statute to apply extraterritorially, the statute must contain language that makes "a clear expression of Congress's intent for extraterritorial application." This rule is referred to as the Foley Doctrine.[4]

Except for one case,[5] courts consistently have refused to apply the NEPA outside of the United States In the one exception, *Environmental Defense Fund v. Massey*,[6] the D.C. Circuit held that the NEPA applies to the National Science Foundation's decision to burn food wastes in Antarctica. The *Massey* court based its decision on two grounds: the absence of a sovereign within Antarctica, and the location of the agency decision-making process (which occurred in the United States).

More recently, in *NEPA Coalition of Japan v. Les Aspin*,[7] the D.C. District Court refused to make an extraterritorial application of the NEPA. In supporting its decision, the D.C.

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[1] 16 U.S.C. §§ 1531-1543 (1973).

[2] 42 U.S.C. §§ 4321-4370a (1969).

[3] The NEPA does, however, apply to major federal actions located outside of the United States that have significant environmental impacts inside the United States. The location of the impact, and not the action, generates the NEPA application.

[4] Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 285 (1949). The doctrine dictates that unless a clear contrary intent appears, all legislation will be presumed to apply only within the United States.

[5] Although only the *Massey* court held that the NEPA has extraterritorial application, other courts have come close to making such statements. In Wilderness Society v. Morton, 463 F.2d 1261, 1262 (D.C. Cir. 1972), the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) simply assumed that the NEPA had overseas application relative to United States effort to build a portion of the Trans-Alaska Pipeline across a segment of Canada. Six years later, the United States District Court for the District of Columbia (D.C. District Court) held that the United States government must prepare an environmental impact statement prior to executing an operation that required the spraying of herbicide in Mexico. National Organization for the Reform of Marijuana Laws (NORML) v. Department of State, 452 F. Supp. 1226 (D.D.C. 1978) (although this court never addressed the extraterritoriality of the NEPA).

[6] Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

[7] 837 F. Supp. 466 (D.D.C. 1993).

District Court cited the following: (1) the strong presumption against extraterritorial application; (2) possible adverse affect on existing treaties; and (3) the adverse affect on United States foreign policy.[8] Additionally, the district court referred to *Massey* as an aberrational result.[9]

Similarly, the ESA only has been found to have extraterritorial application in a single case, *Defenders of Wildlife, Friends of Animals v. Lujan (Defenders II)*.[10] In *Defenders II*, the Eighth Circuit seized on language in the ESA which the court asserted equates to an expression of "clear congressional commitment to worldwide conservation efforts."[11] Based on this language, the Eighth Circuit stated that the ESA, viewed as a whole, contains the requisite expression of extraterritoriality. The Eighth Circuit was willing to accept, in the absence of a stated "clear expression" of extraterritorial application, an ambiguous and less clear spirit of "intent" for this application.

The United States Supreme Court later reversed the Eighth Circuit. The reversal, however, was not based on the substantive issues alleged, but on lack of standing by the plaintiffs.[12] Commentators insist that the result would have been the same had the Court considered the extraterritoriality question.[13] This author agrees. The Foley Doctrine requires an express, not an implied, clear expression of extraterritoriality. In other words, the use of the word "clear" in the Foley Doctrine, means nothing less than "clear."[14]

Unlike *Defenders II*, *Massey* never was reversed; the Clinton Administration chose not to appeal the case. Additionally, because *Massey* does not rely on an attempt to satisfy the Foley Doctrine, it poses more problems for JAs. Under the *Massey* rationale, any military operation that is (1) planned (agency decision making) in the United States and (2) executed in a territory where no sovereign exists (such as Antarctica), might trigger the NEPA. A hindsight application of these elements to the United States involvement in Operation Restore Hope illustrates why JAs should remain aware of these basic principles.[15]

Judge advocates must understand the rationale of not applying domestic statutes, such as the NEPA, to overseas operations. This understanding is imperative because lack of standing and nonextraterritoriality do not prevent various groups or members of the media from alleging the NEPA violations. For example, JAs participating in a military operation other than war (MOOTW) in a nation without an obvious government, must understand the significance of *Massey* relative to that type of operational scenario.[16] In short, JAs must be ready to accurately advise their commanders as to the true status of the law and how to proceed.

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[8] The NEPA does not serve to prohibit actions, instead it creates a documentation requirement that ensures that agency decision makers consider the environmental impact of federal actions. The required documents usually are referred to as either environmental assessments (EA) or environmental impact statements (EIS). The production of these documents can substantially delay a planned federal action.

[9] *NEPA Coalition of Japan*, 837 F. Supp. at 467.

[10] 911 F.2d 117 (8th Cir. 1990). In this decision, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) upheld a district court's decision that found that Congress intended for the ESA's consultations procedures be applied to federal activities without regard to the location of the activities.

[11] *Id.* at 123.

[12] Defenders of Wildlife, Friends of Animals v. Lujan, 112 S. Ct. 2130 (1992).

[13] *See* Major David A. Mayfield, The Endangered Species Act and Its Applicability to Deployment of U.S. Forces Overseas, 5-8 (Dec. 1994) (on file with The Center for Law and Military Operations & International and Operational Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia). *See also Defenders of Wildlife*, 112 S. Ct. at 2147. In his concurring opinion, Justice Stevens explained that he disagreed with the majority's determination relative to standing, but concurred with the result, because had the Court considered the issue of extraterritoriality, it would have found that Congress never expressed a desire for the ESA to apply outside of the United States. *But see* Mary A. McDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 446 (1992).

[14] The statute must contain, or at a minimum, strong evidence from the legislative history must indicate, Congress's intent to cause extraterritorial application. Both the NEPA and its history contain little of this evidence. "Congress did not specifically consider the issue [of applying The NEPA to actions in foreign countries]. The Act should be interpreted as applying to federal actions occurring in areas outside the jurisdiction of any other State (i.e. the high seas, Antarctica or outer space) but should not be interpreted as applying to actions occurring within the jurisdiction of another State." *See* Memorandum, Christian A. Herter, Jr., Special Assistant to the Secretary for Environmental Affairs, Department of State, to Russell Train, Chairman, Council on Environmental Quality, subject: Department of State and AID Comments on Draft Guidelines Pertaining to P.L. 91-190, Section 102(2)(C), *reprinted in* Appendix to Hearings on the Administration of The NEPA Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 91st Cong., 2d Sess. 546, 551 (1970).

[15] Senior JAs involved with Operation Restore Hope reported that the most "striking legal aspect of [that] operation was the void of applicable international and local law" and government. The "Unified Task Force operated in a vacuum of host country political and legal infrastructure." The United States position was that Task Force activities were only constrained by the United Nations Charter, customary international law, and United States domestic law. *See* Memorandum, Colonel F.M. Lorenz, USMC, Staff Judge Advocate, Unified Task Force Somalia, to Commander, Unified Task Force, subject: Operation Restore Hope After Action Report/Lessons Learned (12 Apr. 1993).

[16] GERHARD VON GLAHN, LAW AMONG NATIONS 55-57 (6th ed. 1992). Judge advocates also should understand the distinction between a nation's government and the status of statehood. A nation does not lose its sovereignty (becoming a populated version of Antarctica) simply because current conditions have rendered any political faction unable to gain firm control of the national infrastructure.

Executive Order (EO) 12,114[17]

President Carter signed EO 12,114 on January 4, 1979, after extensive debate and negotiations relative to the need to make the NEPA extraterritorial, and if not, to what extent an EO should place "the NEPA-like" requirements on the Department of Defense (DOD) activities performed overseas.[18]

Executive Order 12,114 requires the DOD to implement procedures to address four categories of actions.[19] In practice, these procedures require analysis, consideration, and documentation of the following two categories of actions: (1) major DOD actions that significantly affect (harm) the environment of global commons (*e.g.*, oceans or Antarctica); and (2) major DOD actions that significantly affect the environment of a foreign nation.

Executive Order 12,114, as described above, only applies to DOD actions that amount to "major federal actions which have significant effects on the environment" outside the United States. "Major actions" are those activities that (1) involve substantial expenditures of time, money, and resources, (2) affect the environment on a large geographic scale (or have substantial or concentrated environmental effects on a more limited area), and (3) are significantly different from other actions previously analyzed with respect to the environment.[20] In other words, it does not apply to routine deployments of units, ships, aircraft, or mobile military equipment.[21]

Another important qualifier is that EO 12,114 does not apply to most DOD actions in foreign nations where the foreign nation hosting the acting DOD force is participating or otherwise involved in the action.[22] Additionally, EO 12,114 exempts a number of important activities, which include the following:

> (1) actions that the DOD determines do not do significant harm to the environment outside the United States;
>
> (2) actions taken by the President or members of his cabinet;
>
> (3) DOD actions taken pursuant to the direction of the President (or cabinet member) during an armed conflict;
>
> (4) actions taken pursuant to the direction of the President (or a cabinet member) when national security or interests is (are) involved;
>
> (5) activities of the intelligence components (DIA, NSA, *etc.*);
>
> (6) actions with respect to arms transfers to foreign nations;
>
> (7) actions taken with respect to membership in international organizations;
>
> (8) disaster and emergency relief actions;
>
> (9) actions relating to nuclear activities and nuclear material (not including transfers of nuclear facilities); and
>
> (10) *the Secretary of Defense has the authority to approve additional exemptions.*[23]

As a result of the abundant and broad nature of the foregoing list of exemptions, most foreseeable military operations are exempt from the "NEPA-like" analysis and documentation requirements of EO 12,114.[24] Additionally, EO 12,114 is not subject to judicial review and cannot be the basis of a cause of action for any sort of litigation. With regard to any additional exemption that the DOD decides to create (under exemption 10 listed above), it first must consult with the Department of State.[25]

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[17] Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321, at 515 (1982) [hereinafter EO 12,114]. Portions of EO 12,114 are reprinted and discussed in DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF MAJOR DOD ACTIONS, apps. G, H (23 Dec. 1988) [hereinafter AR 200-2].

[18] *See* Memorandum, Colonel Winston M. Haythe, to Lieutenant Colonel David M. Crane, Chief International and Operational Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, subject: Extraterritorial Application of the NEPA (15 Oct. 1993), *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS & INTERNATIONAL AND OPERATIONAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, OPERATIONAL LAW—CASES AND MATERIALS, ch. 9 (2d ed. 1995) [hereinafter OP. L.—CASES AND MATERIALS].

[19] The Army has satisfied this obligation by issuing AR 200-2, *supra* note 17. Appendices G and H are well written and provide a good explanation of EO 12,114's mandate.

[20] Department of Defense, Overseas Environmental Baseline Guidance Document, 17-2 (Oct. 1992).

[21] *Id.* para. 9.

[22] *See* AR 200-2, *supra* note 17, app. H., para. B.1.a.

[23] EO 12,114, *supra* note 17 (emphasis added).

[24] AR 200-2, *supra* note 17, app. H., para. C.3.

[25] *Id.* para. 8-3.c.

United States Policy

Although the strict requirements of domestic law do not apply to most overseas operations, United States policy has been described as requiring adherence "to United States environmental requirements, if feasible."[26] This apparent conflict is resolved by a clear understanding of what is meant by the satisfaction of "United States environmental law." In overseas military operations (that do not generate an adverse environmental impact within the United States), compliance with EO 12,114, not the NEPA, satisfies this requirement. Section 1 of EO 12,114 specifically states that the EO "represents the United States Government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the NEPA, with respect to the environment outside the United States, its territories and possessions."

Compliance with EO 12,114 usually presents few problems relative to an overseas operation.[27] Judge advocates should, however, coordinate their advice with their higher headquarters' staff judge advocates to ensure that their analysis is based on complete and accurate information.[28]

Once the JA has identified the proper EO 12,114 exemptions for the contemplated United States action, no further analysis is required. Yet, even though there is no requirement for the type of exhaustive analysis required by the NEPA or EO 12,114, JAs must ensure that their commanders consider the environment during every phase of the planning process.[29] Additionally, the facts and circumstances that merit the application of one or more of the exemptions must be documented.

Operation Sea Signal (Cuban migrant holding camps at Guantanamo Bay, Cuba) provides a recent example of this process. The Commander in Chief, United States Atlantic Command (USCINCACOM) requested an exemption from EO 12,114 documentation requirements for the construction and operation of temporary camps at Naval Station Guantanamo Bay, Cuba.[30] The USCINCACOM's request was forwarded through the Joint Staff to Mr. Paul G. Kaminski, The Under Secretary of Defense (Acquisition and Technology), for approval. Mr. Kaminski approved the request, citing the importance of Sea Signal to national security.[31] Upon approval, Mr. Kaminski "requested" that USCINCACOM and its subordinate commands mitigate negative environmental impacts to "the extent practicable and consistent with national security."[32]

The DOD is not opposed to conducting the type of superb planning that earned it the reputation for being the finest and most effective fighting force on Earth. Our leaders are justifiably concerned, however, regarding the prospect of needless and frequently multiplicious documentation, while national security hangs in the balance. Judge advocates must help these leaders perform their missions, in compliance with the law, but without needless documentation and delay.[33] Recent operations, such as Sea Signal, reflect the ability military lawyers have in ably assisting commanders to comply with domestic environmental law, without obstructing the commander's execution of the mission.

Although United States policy seeks to limit environmental damage, the moment will arrive when the JA must understand the bottom line. A deployment checklist item for the deploy-

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[26] U.S. ARMY LEGAL SERVICES AGENCY, THE DESERT STORM ASSESSMENT TEAM'S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY (22 Apr. 1992) (see the Environmental Law chapter at page 3 and "Issue 143") [hereinafter DSAT]. Some JAs during Operation Desert Storm received confusing guidance on the application of United States-like environmental protections to their activities, when feasible. This guidance was not based on the requirements of either the NEPA or EO 12,114. Every single United States activity in Southwest Asia (taken pursuant to Operations Desert Shield/Storm) was exempted under EO 12,114.

[27] Unfortunately, the favorable mandate of EO 12,114 could change. In the aftermath of *Massey*, President Clinton ordered the National Security Council (NSC) to conduct an interagency review of the extraterritoriality of the NEPA and the application of EO 12,144. During the course of this review, the NSC generated several documents (the first entitled, "Proposed Revisions to EO 12114" and the second entitled, "Summary of Agency Comments on PRD-23 Proposed Package"). The NSC concluded that the NEPA does not apply to United States activity in other states and should not be revised to encompass such activity. The NSC does recommend the revision of EO 12,114. The recommended changes would either eliminate, change, redefine, or clarify a number of the most important exemptions under the current EO 12,114. Since early 1994, however, there has been no movement on this initiative, and none is expected in the near future. Memorandum (and enclosures), Colonel William J. McGowan, Chief, Environmental Law Division, to Colonel Ray Ruppert, Chief, International and Operational Law Division, Office of The Judge Advocate General of the Army, subject: Proposals for PRD 23 (The NEPA Review) (copy available in the Center for Law & Military Operations, The Judge Advocate General's School, United States Army, Charlottesville, Virginia).

[28] Higher level staff judge advocates already may have a prepared action which expresses the DOD's position relative to the application of an EO 12,114 exemption.

[29] *See* AR 200-2, *supra* note 17, para. 8-1.

[30] *See* Memorandum, Lieutenant General Walter Kross, Director, Joint Staff, to The Under Secretary of Defense for Acquisition and Technology, subject: Exemption from Environmental Review (17 Oct. 1994) (General Kross forwarded the USCINCACOM request for exemption. The request was based on a cursory review of Sea Signal's probable environmental impact, a short rendition of the facts, and a brief legal analysis and conclusion).

[31] *See* Memorandum, Paul G. Kaminiski, Under Secretary of Defense (Acquisition and Technology), to Director, Joint Staff, subject: Exemption from Environmental Review Requirements for Cuban Migrant Holding Camps at Guantanamo, Cuba (Operation Sea Signal Phase V) (5 Dec. 1994).

[32] *Id.*

[33] During Operations Desert Shield/Storm some JAs became confused as to the need for an "emergency waiver" of the NEPA. Several of the DSAT presumptions are inaccurate because of confusion relative to the need to apply the NEPA to our activity in Southwest Asia. In reality, no such waiver was needed. *See* DSAT, *supra* note 26, issue 143.

ing JA should be the determination of which of the foregoing EO 12,114 exemptions the DOD is relying on.

Laws of Host Nations

United States forces are immune from host nation laws where:

(1) immunity is granted by agreement;

(2) United States forces engage in combat with national forces;[34] or

(3) United States forces enter under the auspices of a United Nations sanctioned security enforcement mission.[35]

The question of immunity is unresolved where United States forces enter in a noncombat mode, with no intent to enforce peace or end cross-border aggression. In Operation Restore Democracy, United States forces entered as part of a multinational force to protect human rights and restore democracy.[36] There are three arguments as to why host nation environmental law should not have applied:

(1) consent to enter by legitimate (recognized) government included implied grant of immunity;[37]

(2) Law of the Flag applied, as it did during Operation Provide Comfort;

(3) operation was sanctioned by the United Nations as a Chapter Seven enforcement action (even though peace enforcement in this context does not provide an exact fit).

Bottom Line

Judge advocates should contact the unified or major command to determine the DOD's position relative to the applicability of host nation law. Judge advocates should request copies of relevant treaties or international agreements from the MACOM Staff Judge Advocate or the unified command legal advisor. Finally, JAs should aggressively seek information relative to any plan to contact a foreign government to discuss environmental agreements or issues. This is because the Army must consult with the Department of State before engaging in "formal" communications regarding the environment.[38]

Traditional Law of War (LOW)

During the closing days of February 1991, Iraq transformed its promise to wage the "mother of all battles" into a devastating assault on the natural environment. Iraq released millions of barrels of oil into the sand, waters, and air of the Persian Gulf states.[39] The reactions of the international community varied greatly.[40] Most nations felt that the international LOW did not adequately regulate this type of destruction.[41] Others felt that the LOW was clear enough and that Iraq had violated it.[42]

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[34] This exception is based on a classical application of the Law of the Flag theory. This term is sometimes referred to as "extraterritoriality," and stands for the proposition that a foreign military force that enters a nation either through force or by consent is immune from the laws of the receiving nation. The second prong of this theory (the implied waiver of jurisdiction by consenting to the entrance of a foreign force) has fallen into disfavor. WILLIAM W. BISHOP, JR., INTERNATIONAL LAW CASES AND MATERIALS 659-661 (3d ed. 1962). *See also* DEPT OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE—VOLUME I, para. 11-1 (1 Sept. 1979) [hereinafter DA PAM. 27-161-1].

[35] This theory is a variation of the combat exception. Operations that place a United Nations force into a hostile environment, with a mission that places it at odds with the de facto government, may trigger this exception. This is another of the very few examples of where the Law of the Flag, as a theory of sovereign immunity within a foreign nation, survives.

[36] S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994).

[37] *See* DA PAM. 27-161-1, *supra* note 34, para. 11-1. This is the weakest argument, as this theory is in disfavor.

[38] *See* AR 200-2, *supra* note 17, para. 8-3.c.

[39] Official estimates of the amount of oil either released or burned vary, but all place the amount into the millions of barrels. *Protection of the Environment in Times of Armed Conflict*, G.A. Res. 47/37, U.N. GAOR, 47th Sess., U.N. Doc. A/Res/47/37 (1993) [hereinafter G.A. Res. 47/37]. Dr. John H. McNeill, Deputy General Counsel, DOD, reported the "torching of 732 oil wells" and the "deliberate spillage of 4-6 million barrels of oil." *See* 70th Anniversary Conference of the Association of Alumni and Attenders of the Hague Academy of International Law—Protection of the Environment in Times of Armed Conflict: Environmental Protection in Military Practice (July 19, 1993) [hereinafter 1993 Hague Environmental Conference] (copy available in the Center for Law and Military Operations, The Judge Advocate General's School, United States Army, Charlottesville, Virginia).

[40] G.A. Res. 47/37, *supra* note 39, at 4-5.

[41] *Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict*, U.N. GAOR, 6th Comm., 48th Sess., Agenda Item 144, at 3, U.N. Doc. A/48/269 (1993) [hereinafter *Secretary-General Report*].

[42] *Id.* at 3. *See also* Memorandum, Colonel James P. Terry, Legal Counsel to the Chairman, Joint Chiefs of Staff, to Department of Defense General Counsel, subject: Protection of the Environment in Times of Armed Conflict (23 Sept. 1993) (copy available in the Center for Law and Military Operations, The Judge Advocate General's School, United States Army, Charlottesville, Virginia).

Even among the nations who agreed that Iraq violated the LOW, that consensus dissipated during the debate on exactly what LOW principles and treaties were violated, and on what steps should have been taken to address the violations.[43]

Many nations have proclaimed their belief that the LOW does not provide enough protection for the natural environment.[44] In accommodating this view, the United Nations has entertained a continuing discussion for the need of a fifth Geneva Convention, directed solely at protecting the environment.[45] The United States, on the other hand, has steadfastly asserted that the environment is already adequately protected, and that the international community should focus its efforts on clarifying and enforcing the existing rules.[46]

For the present, the United Nations, International Committee of the Red Cross (ICRC), and most nations seem to share the United States position.[47] While the debate over interpretation and clarification wages on, one question appears near resolution.[48] What provisions of international law apply? After answering this question, the JA must deal with the real world application of these laws to operations across the entire operational spectrum.

Although the LOW is technically not applicable until a state of armed conflict exists,[49] many MOOTW require the application of LOW principles as guidance.[50] The prudent JA generally advises the application of LOW in these operations because to apply some other standard confuses troops that have been trained to the LOW standards and the situation can quickly evolve into an armed conflict.[51] The entire body of LOW that impacts on the treatment of the environment may be referred to as Environmental Law of War (ELOW).

Customary Law

The environment never was considered during the evolution of customary international law, or during the negotiation of all of the pre-1970s LOW treaties. Yet, the basic LOW principles that serve as the foundation of the LOW apply to limit the destruction of the environment during warfare. For example, the customary LOW balancing of military necessity, proportionality, and superfluous destruction of property (which includes the environment) applies to provide a threshold level of protection for the environment.

Conventional Law

A number of the well known LOW treaties have tremendous impact as ELOW treaties. These treaties are discussed below.

Hague IV[52]

Hague IV and the Hague Regulations (HR) represent the first time that ELOW principles were codified into treaty law. The HR restated the customary principle that methods of warfare are not unlimited (serving as the baseline statement for ELOW).[53]

The HR forbids the use or release of force calculated to cause unnecessary suffering or destruction,[54] and prohibits destruction or damage of property in the absence of military necessity.[55] Taken together, these rules require commanders to balance the importance of a particular military objective (military necessity) against the potential destruction to the

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[43] *Secretary-General Report, supra* note 41, at 19-21.

[44] *Id.* at 3-4.

[45] *See* 1993 Hague Environmental Conference, *supra* note 39, at 5, 13.

[46] *See* James P. Terry, *The Environment and the Laws of War: The Impact of Desert Storm*, XLT NAVAL WAR C. REV., Winter 1992, at 65-66.

[47] *See Secretary-General Report, supra* note 41, at 19.

[48] *Id.* at 4-8.

[49] The type of conflict contemplated by Article 2, common to the four Geneva Conventions.

[50] During most of Operation Provide Comfort and all of Operation Restore Hope, the United States position was that the LOW was not triggered. However, United States forces complied with the general tenets of the LOW. *See* DSAT, *supra* note 26, at Operational Law 15-16.

[51] With regard to Operation Provide Comfort, the question of whether the United States was an occupying force remains open. The DSAT reported that we were not an occupant. *Id.* However, in DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS, at O-8 (Apr. 1992) [hereinafter FINAL REPORT TO CONGRESS], the DOD reported that we were occupants and were bound by the international law of occupation. This reinforces the point that, when possible, JAs should err on applying the LOW standards to situations that are analogous to armed conflict, might become armed conflict, or might be easily interpreted by others as armed conflict.

[52] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 (including the regulations thereto) [hereinafter Hague IV or HR].

[53] *Id.* art. 22.

[54] *Id.* art. 22e.

[55] *Id.* art. 23g. Most nations and scholars agree that Iraq's release of oil into the Persian Gulf during its retreat from Kuwait, during Operation Desert Storm, violated this principle. Iraq failed to satisfy the traditional balancing test between military necessity, proportionality, and unnecessary suffering/destruction. *See generally Terry, supra* note 46, at 62-63.

environment. For example, when the accomplishment of a mission appears extremely important, the degree of permissible destruction increases.[56]

Judge advocates should analyze the application of these principles to ELOW issues in the same manner that they would address the possible destruction or suffering associated with any other weapon use or targeting decision. One might wonder whether this well known, yet abstract rule, will provide meaningful guidance. The answer is yes. Although abstract, the traditional approach driven by the HR will nevertheless resolve most ELOW questions that a JA will encounter.

For example, an enemy defensive position that occupies a key point along a United States axis of advance may be shelled by artillery, bombed by high altitude bombers, and attacked by an armored force. Employing the HR balancing test (and information from the planning staff), a JA could quickly determine that the tactical value of the mission outweighs the resulting damage to the environment. Conversely, Iraq's release of oil into the air, land, and waters of the Middle East caused damage so severe that it has been unable to claim an object of military necessity important enough to justify the resulting environmental carnage.[57]

When performing the analysis required for the foregoing decisions, three factors merit particular attention: (1) the geographical extent (how widespread the damage will be); (2) the longevity; and the (3) severity of the damage on the target area's environment.

The foregoing analysis also should address the danger of altering or destroying extraordinary terrain features. For example, are dams or nuclear power plants located in the area? The answer to this question might affect all three of the factors listed above. In other words, the JA must learn about the effect of the proposed weapon system (immediate and residual), the nature of the target area, and the value of the mission.

Hague Regulations ELOW protections enjoy the widest spectrum of application of any of the ELOW conventions. They apply to all property, wherever located, and by whomever owned.

The 1925 Gas Protocol[58]

The Gas Protocol bans the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices. . . ."[59] during war. This treaty is an important component of ELOW because many chemicals (especially herbicides) are extremely persistent, cause devastating damage to the environment, and even demonstrate the ability to multiply their destructive force by working their way up the food chain.

The United States is a party to this treaty, but asserts that neither herbicides nor riot control agents (RCA) are chemicals, as defined by the Gas Protocol. Consequently, the United States has reserved the right to use agents of both varieties under certain circumstances.[60]

As a result of both internal and international pressure to address the issue of chemical weapon use, President Ford signed EO 11,850 on April 8, 1975. Executive Order 11,850 specifies United States policy relative to the use of chemicals, herbicides, and RCA, and sets out four clear rules regarding the Gas Protocol. First, the United States reserves the right to retaliate with chemical weapons if these weapons are first used against United States forces. Second, as a general rule, the United States renounces the use of both herbicides and RCA, in war. Third, as a matter of policy, herbicides and RCA may not be used "in war," in the absence of national command authority (NCA) authorization. Finally, these restrictions do not apply relative to uses that are not methods of warfare.

In regard to herbicides, the EO sets out the two uses that are expressly permitted, even without NCA authorization. These two uses are (1) domestic use and (2) control of vegetation within and around the "immediate defensive perimeters"[61] of United States installations. The term "installations" is generally understood to include any camp or area used to shelter United States forces in any type of operational setting.

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[56] This basic method of analyzing the sliding scale of permissible carnage is well established in United States doctrine. *See* DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) [hereinafter FM 27-10].

[57] *See* FINAL REPORT TO CONGRESS, *supra* note 51, at O-22 to O-27.

[58] The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061 [hereinafter Gas Protocol].

[59] *Id.* at 572.

[60] The United States did not ratify the Gas Protocol until after its involvement in the Vietnam war ended. The ratification was accompanied by several reservations which are reflected in Executive Order 11,850, 40 Fed. Reg. 16187 (1975), *reprinted in* FM 27-10, *supra* note 56, at C1-C2 [hereinafter EO 11,850]. The United States issued EO 11,850 as a compromise, wherein it first renounces the use of herbicides and riot control agents (contrary to its reservation to the Gas Protocol), and then sets forth a number of exceptions to the general renouncement. The EO then further restricts their use by making such use subject to whatever additional "rules and regulations the Secretary of Defense" deems necessary.

[61] The type of terrain, foreseeable tactics of enemy forces, and weapons routinely used in the area will control the depth of an "immediate defensive area."

The 1993 Chemical Weapons Convention (CWC)[62]

Although the United States has not yet ratified this treaty, President Clinton forwarded a strong endorsement with his transmittal letter.[63] The CWC regulates much of the same activities that the Gas Protocol currently controls. The CWC does not, however, supersede the Gas Protocol. Instead, it "complements" the Gas Protocol. Yet, wherever the CWC creates a more rigorous rule, the CWC applies.[64]

Relative to ELOW, the CWC resolves two issues. First, it flatly prohibits the wartime use of chemical weapons, even retaliatory second use. Second, regarding the character of herbicides and RCA, the CWC states that they both are chemicals and, as such, are banned. However, the language employed by the CWC is much different than that used by the Gas Protocol.

Instead of banning the use of an agent "in war" as did the Gas Protocol, the CWC bans the use of agents (in an international armed conflict) as "a method of warfare."[65] Accordingly, herbicides and riot control agents still could be used during the course of an armed conflict, assuming their use is not considered a method of warfare.

Frequently, JAs look to the seemingly restrictive language of EO 11,850 and make a mental note that they probably will not be called on to provide advice relative to the use of a herbicide. However, given the nature of MOOTW, JAs may be called on to provide advice relative to herbicide use in an array of different circumstances.[66]

For instance, operational environments that require aggressive measures to protect the force, or to establish and maintain zones for the protection of noncombatants in areas of heavy vegetation, require JAs to become familiar with how to properly interpret what is meant by "immediate defensive perimeters."[67]

The Department of the Army's position relative to MOOTW (operations that do not involve international armed conflict)[68] is that these operations are conducted for peaceful purposes and do not constitute armed conflict. The Army's doctrinal statement relative to MOOTW, found in *FM 100-5*, indicates that these operations are characterized by a noncombat environment, accompanied by much more restrictive Rules of Engagement (ROE). Accordingly, the use of RCA in such operations is not done as a method of warfare, and would not violate the CWC.

The same logic could be applied to herbicide use in similar MOOTW.[69] However, JAs should be aware that the Administration's current policy regarding RCA restricts the list of permissible uses enumerated in EO 11,850. This policy removes (1) "situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided" and (2) "rescue missions in remotely isolated areas, of downed aircraft and passengers, and escaping prisoners" as permissible

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[62] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter CWC].

[63] President Clinton transmitted the CWC to the Senate for advice and consent on November 23, 1993. *Chemical Weapons Convention* (Letter of Transmittal from President William J. Clinton), DEP'T ST. DISPATCH, Dec. 6, 1993, at 849 [hereinafter Letter of Transmittal].

[64] *Id.* preamble.

[65] *Id.* art. II, 1(a)-(b). *See also* CENTER FOR LAW AND MILITARY OPERATIONS & INTERNATIONAL AND OPERATIONAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW OF WAR WORKSHOP, CASES AND MATERIALS ON THE LAW OF WAR, 9-18 (1995) [hereinafter LAW OF WAR CASES AND MATERIALS]; ("Methods of warfare" refers to actions which further a belligerent's tactical or strategic objectives); CLAUDE PILLOUD, INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 390-391 (Yves Sandoz ed., 1987) [hereinafter Sandoz]. Sandoz describes a method of warfare in the context of the customary LOW, as means adopted to directly injure the enemy to further some type of military purpose. *See also* Memorandum, W. Hays Parks, For The Judge Advocate General, to the Staff Judge Advocate, United States Central Command, subject: Stinger Grenade; Legal Review of (24 Sept. 1990) (During a discussion of the CWC, Mr. Parks defines "methods of warfare" as the use of a chemical agent (relative to the CWC) to further the tactical or strategic objectives of a belligerent in international armed conflict.)

[66] DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 36-37 (30 Dec. 1994) [hereinafter FM 100-23]. Operational security is a doctrinal imperative of MOOTW. Commanders are encouraged to reduce threats to the force by taking actions that improve surveillance of the immediate defensive perimeters. With the ever increasing range and lethality of modern weapon systems, the immediate defensive perimeter might extend for a distance of several kilometers from the actual United State troop or protective zone location.

[67] VON GLAHN, *supra* note 16, at 743. However, the United States military has not employed herbicides since it discontinued their use in 1967 during the war in Vietnam. The United States Army made a doctrinal omission in *FM 100-23* when it discussed the possibility of the use of riot control agents under the section entitled "Chemical Units," but made no mention of the use of herbicides. Herbicides and riot control agents were the sister agents that were regulated by EO 11,850. *See* FM 100-23, *supra* note 66, at 44.

[68] Military operations other than war include peace operations, humanitarian or disaster relief operations, noncombatant evacuation operations, counterterrorist operations, and law enforcement operations (the complete list of MOOTW is printed in DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, ch. 13 (14 June 1993).

[69] *See* LAW OF WAR CASES AND MATERIALS, *supra* note 65, at 9-18.

uses during both armed conflict and MOOTW. However, this restriction would not affect the analogy to herbicide use during MOOTW or the two permissible uses of herbicides (in either armed conflict or MOOTW).[70]

1980 Conventional Weapons Convention (COWC)[71]

On May 12, 1994, President Clinton submitted Optional Protocols I and II of the COWC to the Senate for its advice and consent.[72] To become a party to the treaty, the COWC requires the ratification of two of its three optional protocols. Only Optional Protocol II has ELOW significance because it places restrictions on the use of mines, booby traps, and other devices. The ELOW significance of this treaty lies in the fundamental right to a safe human environment.

The COWC bans the indiscriminate use of these devices. Indiscriminate is defined as use

> (1) which is not directed against a military objective, (2) which employs a method or means of delivery that cannot be directed at a specific military objective, or (3) which may be expected to cause incidental loss of civilian life, injury to civilian objects (which means property, which in turn means the environment), which would be excessive [in relation to military necessity].[73]

The COWC also bans the use of remotely delivered mines or devices, unless the location of these devices is accurately recorded, or an effective (self-actuating) neutralizing device is used to render each device harmless once hostilities have ceased.[74]

The Fourth Geneva Convention (GC)[75]

The GC is a powerful ELOW convention, but it does not have the wide application enjoyed by the HR. The protection afforded by the most important GC ELOW provision, Article 53, is limited to the environment within an occupied territory:

> Article 53. Any destruction by the *Occupying* Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, *except where such destruction is rendered absolutely necessary by military operations.*[76]

A second limitation is that Article 53 only prohibits the destruction or damage of property in the absence of "absolute military necessity." Accordingly, when military necessity is present, the protections of Article 53 are overridden.

At first glance, the foregoing limitations appear to severely limit the import of the GC relative to ELOW. After all, when was the last time that the United States openly admitted that it was an occupying power? Many recent United States operations, however, probably triggered some form of GC ELOW application. For example, the United States seizure of southern Iraq during Operation Desert Storm constituted occupation.[77] Accordingly, any act that might have degraded the environment should have been analyzed in accordance with GC, Article 53.

What about other recent operations, such as Operations Restore Hope and Restore Democracy? Although the United

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[70] *See* Memorandum, W. Hays Parks, For The Judge Advocate General, to The Office of the Deputy Chief of Staff for Operations and Plans, subject: Request for Review—Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes (20 Sept. 1994) (while explaining that pepper spray is a RCA and subject to the same constraints on use as any other RCA, Mr. Parks explains that the current policy precludes the two EO 11,850 uses described above, but permits the remaining two uses, because these uses represent "use for defensive purposes to protect noncombatants"). *See also* Memorandum, John M. Shalikashvili, Chairman of the Joint Chiefs, to The Vice Chief of Staff, United States Air Force, subject: Use of Riot Control Agents (1 July 1994) (General Shalikashvili described the Executive order that will soon replace EO 11,850, once the CWC is ratified. He further stated that current United States policy permits RCA use in MOOTW and in areas under direct United States military control. His statement demonstrates United States resolve for the continued use of EO 11,850 type agents, even after the CWC is ratified.).

[71] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Excessively Injurious or Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1525 [hereinafter COWC].

[72] Letter from W. Hays Parks, Chief, International Law Branch of the International and Operational Law Division, Office of The Judge Advocate General (June 17, 1994) (copy available in the Center for Law and Military Operations & International and Operational Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia).

[73] COWA *supra* note 71, art. 3.

[74] *Id.* art. 5.

[75] The Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC].

[76] *Id.* art 53 (emphasis added).

[77] *See* FINAL REPORT TO CONGRESS, *supra* note 51, at O-8. But not everyone agrees that the United States was an occupant. The apparent Army position is that the legal requirements for formal occupation were never satisfied. *See* DSAT, *supra* note 26, Operational Law-15.

Nations and the United States position is that the LOW does not apply to either operation,[78] because neither constituted international armed conflict, the coalition forces in each operation applied many of the rules found within the LOW as guidelines (the practice of law by analogy).[79]

During all recent operations other than war, the United States has applied principles of the traditional law of war, even when the LOW did not technically apply. Similarly, ELOW may apply as a matter of policy, even when the formal legal triggers have not yet been pulled.[80] Further, in many such operations, the application of human rights legislation may regulate the conduct of United States forces. When this happens, many of the rules (or variations of these rules) found in the formal ELOW will apply.[81]

Article 147 provides the enforcement mechanism for the GC. Under its provisions "extensive" damage or destruction of property, not justified by military necessity, is a grave breach of the conventions. All other violations that do not rise to this level are lesser breaches (sometimes referred to as "simple breaches").

Neither the GC nor its official commentary define or provide guidance as to the meaning of "extensive."[82] Not every assault on nature that violates the LOW rises to this level. For example, *FM 27-10* states that "poisoning wells or streams" is not a grave breach.[83] Because the GC was designed to protect civilians and their property, extensive damage probably refers to a violation that places civilians over an extended area at great risk. Although "extensive" also may refer to the severity of damage in a relatively small area or the longevity of the damage, it probably refers most directly to the geographical scope of the damage.[84] This type of an analysis provides military commanders and their lawyers with a meaningful standard.

The distinction between a simple and a grave breach is important. A grave breach requires parties to the conventions to search out and then either prosecute or extradite persons suspected of committing a grave breach.[85] A simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach.[86]

United States policy requires the prompt reporting and investigation of all alleged war crimes (including ELOW violations) as well as appropriate disposition under the provisions of the Uniform Code of Military Justice.[87] These obligations make our soldiers vulnerable if they are not well trained regarding their responsibilities under ELOW provisions.

The ENMOD Convention[88]

The United States negotiated the ENMOD Convention during the same period as it negotiated Protocol I Additional to the Geneva Conventions, and ratified it in 1980. Unlike all the other ELOW treaties that ban the effect of various weapon systems on the environment, the ENMOD Convention bans the manipulation or use of the environment itself, as a weapon. Any use or manipulation of the environment that is

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[78] Unified Task Force Somalia, Operation Restore Hope After Action Report/Lessons Learned, 18-19 (1993).

[79] The situation in Haiti is demonstrative of the need for JAs to be capable of applying LOW principles to operational settings that do not appear to formally trigger LOW application. Although United States forces entered what DOD officials described as a "permissive environment," the situation in Haiti (at the time this article was written) looks more like occupation. Special Advisor to the President on Haiti Lawrence A. Pezzullo states "to this date Aristide is not running the nation; the U.S. is in effective control of the nation. Not a single ministry in Haiti now operates. We are an army of occupation." Telephone Interview with Former Ambassador Lawrence A. Pezzullo, Recent Special Advisor to the President on Haiti (Dec. 15, 1994).

[80] Occupation has traditionally been referred to as invasion coupled with firm control of the government and the governed. L. OPPENHEIM, INTERNATIONAL LAW 434-35 (7th ed., H. Lauterpacht, 1955). Military lawyers recognize occupation as a question of fact. Once United States forces gain effective control over all or a portion of enemy territory (placing it under United States authority and substituting its authority for that of the legitimate government), by law and doctrine it is occupied. *See* FM 27-10, *supra* note 56, at 138-39. In instances where these elements are not completely met, JAs frequently refer to this condition as "near occupation" and advise their commanders to apply many elements of occupation law by analogy. *See* OP. L.—CASES AND MATERIALS, *supra* note 18, at 9-53.

[81] The JAs that supported the early phases of Operation Restore Democracy issued a pamphlet that forbid "unnecessary destruction of property" and attacks on property "that do not directly contribute to the effort of opposing forces." Headquarters, CARICOM Forces, CARICOM Forces Combined Operations Guide: Ten Commandments of Human Rights (1994).

[82] OSCAR M. UHLER, COMMENTARY IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 596 to 602 (Jean S. Pictet ed. 1958).

[83] *See* FM 27-10, *supra* note 56, at 180.

[84] *Webster's New World Dictionary* defines extensive as "1. covering a large area; 2. having a wide scope." WEBSTER'S NEW WORLD DICTIONARY 496 (2d ed. 1980).

[85] *See* GC, *supra* note 75, art. 146, cl. 2.

[86] *Id.* art. 146, cl. 3.

[87] DEPT. OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, paras. C.3., E.2.e.(2)-(3) (July 10, 1979); FM 27-10, *supra* note 56, para. 507.

[88] The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151.

either (1) widespread, (2) long-lasting, or (3) severe, violates the ENMOD (single element requirement).[89] Another distinction between the ENMOD Convention and other ELOW provisions is that it only prohibits environmental modifications that cause damage to another party to the ENMOD Convention.

The application of the ENMOD is limited, because it only bans efforts to manipulate the environment with extremely advanced technology. The simple diversion of a river, destruction of a dam, or even the release of millions of barrels of oil do not constitute "manipulation" as contemplated under the provisions of the ENMOD. Instead, the technology must alter the "natural processes, dynamics, composition or structure of the earth . . . ." Examples of this type of manipulation are (1) alteration of atmospheric conditions to alter weather patterns, (2) earthquake modification, and (3) ocean current modification (military use of tidal waves).

The drafters incorporated the distinction between high versus low technological modification into the ENMOD to prevent an unrealistic extension of the ENMOD. For example, if the ENMOD regulated low technological activities, then such actions as cutting down trees to build a defensive position or an airfield, diverting water to create a barrier, or bulldozing earth might all be considered activities that violate the ENMOD. None of these activities, nor similar low technological activities, are controlled by the ENMOD.

Finally, the ENMOD does not regulate the use of chemicals to destroy water supplies or poison the atmosphere.[90] This is the application of a relatively low technology, which the ENMOD does not reach.[91]

Although the relevance of the ENMOD Convention appears to be minimal given the current state of military technology, JAs should become familiar with the basic tenets of the ENMOD. This degree of expertise is important because some nations argue for a more pervasive application of this treaty. Judge advocates serving as part of a multinational force must be prepared to provide advice relative to the ENMOD Convention, even if this advice amounts only to an explanation as to why the ENMOD Convention has no application, despite the position of other coalition states.[92]

The 1977 Protocol I Additional to the Geneva Conventions (GP I)[93]

Because the United States has not yet ratified GP I,[94] the United States is bound only by GP I provisions that reflect customary international law.[95] To some extent, GP I Articles 35, 54, 55, and 56 (the environmental protection provisions within GP I) merely restate HR and GC environmental protections. To this extent, these provisions are enforceable. However, the main focus of GP I protections go far beyond the GC or the HR protections. GP I is much more specific relative to the declaration of these environmental protections. GP I is the first LOW treaty that specifically provides protections for the environment by name.

The primary difference between GP I and the protections found with the HR or the GC is that once the degree of damage to the environment reaches a certain level, GP I does not employ the traditional balancing of military necessity against the quantum of expected destruction. Instead, it establishes this level as an absolute ceiling of permissible destruction. Any act that exceeds that ceiling, despite the importance of the military mission or objective, violates ELOW.

Articles 35 and 55 sets forth this absolute standard as any "method of warfare which is intended, or may be expected, to cause widespread, long-term and severe damage to the environment." The individual meanings of the terms "widespread," "long-term," and "severe damage" have been debated at length. The ceiling is only reached when all three elements are satisfied (unlike the single element requirement of the ENMOD Convention).

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[89] For a better understanding of the meaning of these three elements *see infra* notes 93-103 and accompanying text for similar elements found in Articles 35 and 55 of the 1977 Protocol I Additional to the Geneva Conventions of 1949.

[90] Although these type of activities would violate the HR and the Gas Protocol.

[91] *Environmental Modification Treaty: Hearings Before the Comm. on Foreign Relations, U.S. Senate*, 95th Cong., 2d Sess. 83 (1978) (Environmental Assessment) [hereinafter Senate Hearings].

[92] AUSTRALIAN DEFENCE FORCE, AUSTRALIAN DEFENCE FORCE PUBLICATION 37, THE LAWS OF ARMED CONFLICT 4-5 TO 4-6 (1994). This publication states that the ENMOD Convention prohibits "any means or method of attack which is likely to cause widespread, long-term or severe damage to the natural environment." *Id.* This gross overstatement of the actual limitations that the ENMOD Convention places on a commander ignores the "high technology" requirement, and serves as an example of the type of misinformation that requires United States JAs to be conversant in treaties, even when the United States is not a party.

[93] Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter GP I].

[94] GP I is one of several LOW treaties that the DOD is currently reviewing for possible ratification. Lieutenant Commander James P. Winthrop, Note, *Law of War Treaty Developments*, ARMY LAW., Aug. 1994, at 55.

[95] *See Secretary-General Report, supra* note 41, at 7. Although the United States has not recently made an official statement relative to whether Articles 35 or 55 have ripened into customary law, several years ago Mr. Michael Matheson, then United States Department of State Deputy Legal Advisor, stated that the third paragraph of Article 35 (the part that adds the "long-term, widespread, and severe" language) is not customary law. Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *reported* in 2 AM. U. J. INT'L L. & POL'Y 428 (1988). On the other hand, some experts believe that the ELOW principles set out by GP I do no more than "incorporate the minimum current consensus of international law on military activities in relation to the natural environment." LAKASHMAN D. GURUSWANY, INTERNATIONAL ENVIRONMENT LAW AND WORLD ORDER—A PROBLEM-ORIENTED COURSEBOOK 967 (1994).

Most experts agree with the commentary to GP I, which states that "long-term" should be measured in decades (twenty to thirty years). Although the other two terms remain largely subject to interpretation, a number of credible interpretations have been forwarded.[96] Within GP I, the term "widespread" probably means several hundred square kilometers, as it does in the ENMOD Convention.[97] While "severe" can be explained by Article 55's reference to any act that "prejudices the health or survival of the population."[98]

Because the general protection found in Articles 35 and 55 require the presence of all three of these elements, the threshold is set very high.[99] For instance, the majority of carnage caused during World Wars I and II (with the possible exception of the two nuclear devices exploded over Japan) would not have met this threshold requirement.[100]

Specific GP I protections include Article 55's absolute ban on reprisals against the environment; Article 54's absolute prohibition on the destruction of agricultural areas and other areas indispensable to the survival of the civilian population; and Article 56's absolute ban on works or installations containing dangerous forces (dams, dikes, nuclear plants).[101]

Although the foregoing protections typically are described as "absolute," the protections do not apply in a number of circumstances. For instance, agricultural areas or other food production centers used solely to supply the enemy fighting force are not protected.[102]

A knowing violation of Article 56 is a grave breach. Additionally, because the three-element threshold set out in Articles 35 and 55 is so high, a violation of these provisions also may be a grave breach, because the amount of damage satisfies the "extensive" damage test of GC Article 147.[103]

Peacetime Environmental Law (PEL)

In cases not covered by the specific provisions of the LOW, civilians and combatants remain under the protection and authority of principles of international law derived from established principles of humanity and from the dictates of public conscience. This doctrine is referred to as the Martens Clause and includes protections established by treaties and customary law that protect the environment during periods of peace (if not abrogated by a condition of armed conflict).[104]

The classical international rule that the commencement of war "ipso facto" terminated all treaties between the warring states is now held in disfavor.[105] Most authorities now assert that although war may cancel many treaties to which the belligerents alone are signatories, it does not cancel multilateral treaties between a host of nations (whose number may include the warring states).[106]

In the aftermath of Operation Desert Storm, the international community generally accepted the application of the Martens Clause as a useful contributor to the protection of the environment in times of armed conflict.[107] Additionally, a

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[96] Sandoz, *supra* note 65, at 410-20.

[97] *Id.* at 417. Sandoz cites to the *Report of the Conference of the Committee on Disarmament*, U.N. GAOR, Comm. on Disarmament, 31st Sess., Supp. No. 27, at 91, U.N. Doc. A/31/27 (1975), wherein the intent of the drafters of the ENMOD Convention relative to each of the three elements is set out as follows: (1) widespread: encompassing an area on the scale of several hundred kilometers; (2) long-lasting: lasting for a period of several months, or approximately one season; and (3) severe: involving serious or significant disruption or harm to human life, natural economic resources, or other assets.

[98] Sandoz, *supra* note 65, at 417. The article 55 language has roughly the same meaning as the meaning of "severe" within the ENMOD Convention.

[99] Some experts have argued that this seemingly high threshold might not be as high as many assert. The "may be expected" language of Articles 35 and 55 appears to open the door to allegations of war crimes any time the damage to the environment is substantial and receives ample media coverage. The proponents of this complaint allege that this wording is far too vague and places unworkable and impractical requirements on the commander. G. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 146-47 (1985).

[100] *See* Sandoz, supra note 65, at 417.

[101] The specific protections afforded by Articles 54, 55, and 56 should be applied in conjunction with Article 57's "precautionary measures" requirement. For example, prior to initiating an artillery barrage, the commander must do everything "feasible" to ensure that no objects subject to special protections are within the destructive range of the exploding projectiles (such as dams, dikes, nuclear power plants, drinking water installations).

[102] However, if the food center is shared by both enemy military and the enemy civilian population (a likely situation), then Article 54 permits no attack that "may be expected to leave the civilian population with such inadequate food or water as to cause starvation or force its movement."

[103] *See Secretary-General Report*, *supra* note 41, at 17. The experts that contributed to the Secretary General's report felt that GP I Articles 35 and 55 should be revised to make it clear that the violation of the "widespread, long-term, and severe damage" prohibition is a grave breach.

[104] *See* HR, *supra* note 52, Preamble. This provision, commonly referred to as the Martens Clause, makes peacetime law applicable to fill in gaps in the LOW.

[105] OPPENHEIM, *supra* note 80, at 302.

[106] *Id.* at 303-05.

[107] *See Secretary-General Report*, *supra* note 41, at 15.

number of exceptional articles detail the peacetime regime that provides environmental protections after the initiation of hostilities.[108]

Conclusion

Judge advocates should learn the rules that exempt most overseas operations from domestic environmental law regimes. Additionally, JAs should master the basic rules of ELOW and integrate them into LOW training and the advice that they give to commanders.

Judge advocates should be prepared to apply these rules in operations that do not technically trigger the LOW (such as MOOTW). Finally, JAs must be aware of the standards of the international community (GP I), even if the United States is not currently obligated to conform its conduct in accordance with those standards. The multinational composition of MOOTW forces requires this degree of sophistication.

When the United States finds itself as part of a coalition force, its actions may be controlled by the standards of other coalition partners. Because 131 states have now ratified GP I and because of the ever increasing involvement of United States forces in MOOTW, United States JAs no longer can ignore this important LOW treaty (especially relative to GP I's environmental protections).[109]

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[108] Major Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1, 22-28 (1992).

[109] Much of the information contained in this article will be updated and reprinted in Tabs E and Q of the 1995 *Operational Law (OPLAW) Handbook*.

Open Cities and (Un)defended Places

*H. Wayne Elliott**

Historical Background

Article 25 of the 1907 Hague Regulations provides "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."[1] One of the problems with law, and particularly the law of war, is that rules that at first glance appear to be simple, prove to be somewhat difficult in application. This article examines a rule that falls in this category; the "open city" rule. This article reviews the development of this rule, from the established doctrine regarding "open cities" to the more recent and nebulous doctrine of "undefended places." The article concludes with an examination of the applicability of the rules to the siege of Sarajevo.

The 1907 open cities rule refined an earlier rule adopted by the 1899 Hague conference on the law of war. The need for a rule was occasioned by the advances made in aerial warfare toward the end of the nineteenth century.[2] The 1899 drafters were concerned about the future impact of airships or balloons on warfare and the capabilities that they would give an attacker.

In formulating the rule, the drafters looked to prior military practice for guidance. In earlier times, there was little difference between a city and a fortification. Early on, European cities had been walled. The wall was designed to keep invaders out and provide the populace a safe haven. Castles were nothing more than walled dwellings.

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[1] Hague Convention No. IV with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 619 [hereinafter Hague Regulations], *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICT 63 (1998).

[2] In 1783 in France, the brothers Montgolfier launched the first successful balloons. Almost immediately, their invention led to speculation as to their military utility. During the Napoleonic Wars the possibility of invading England with a balloon-delivered French Army was considered, but never pursued. Wind and weather limited the military use of balloons to situations where opposing forces were fixed in place, such as a siege. French balloons were used to observe enemy forces; the balloons would be tethered to the ground, sent aloft to observe the enemy, and then lowered to the ground. Cutting the balloon loose would permit it to float over the enemy and, once over the enemy forces, the balloon had the capability of dropping explosives. However, the problem with the wind remained; the dilemma was how to return the balloon to its own lines. During the Civil War, both sides continued to experiment with balloons; although once again, they principally served as observation platforms. The advent of the airplane solved the problem. *See generally* MARTIN VAN CREVELD, TECHNOLOGY AND WAR 183-86 (1989).

The usual practice was for the attacker to besiege the castle or city. Sieges could take months or even years and involved extensive engineering efforts. The commander of the besieging force usually would dig trenches parallel to the walls of the city. The trenches shielded the attackers from direct fire and when the trenches were close enough to the wall, huge siege engines would be brought up and bombardment of the walls would begin. The bombardment's success would depend on the ability of the besieged forces to shore up the walls. The besieger also would have closed off any ingress or egress from the city in the hopes of compelling the city to surrender and permit the attackers to enter.

Occupants of the city or castle would hope that they could simply wait out the siege. Alternatively, the besieger had to be concerned about the possibility of being attacked by a relief force or of running out of supplies before the city did. To avoid all of the unpleasantries that could come to both sides, the city usually was given an opportunity to accept its fate and surrender. This was accomplished by "summoning the castle." The two sides would parley as to the situation.[3] The besieged commander had three alternatives—surrender, fight, or set a time at which, if no relief arrived, the commander would be forced to surrender. Surrender in the face of overwhelming odds was considered honorable. Bombardment would be necessary only if the city refused to surrender or if the besieger felt unable to wait out the besieged.[4]

Improvements in the quality of artillery made fortified cities obsolete. Not only could larger guns pound down the walls, but skilled artillerymen could simply fire over the walls and into the heart of the city. Furthermore, the increase in populations also made walling off whole cities impractical. Nonetheless, the military practice of capturing walled cities laid the groundwork for the next step in developing rules concerning bombardment.

An "open city" was one into which an enemy force might enter without opposition. The enemy might not have to resort to siegecraft before the city was considered to be open. Practically, it became increasingly difficult to conduct a siege. Cities were too large to be surrounded and warfare was too expensive to leave an army in place for months, years, or even decades. At the same time, fortifying large urban areas became increasingly difficult, feeding large populations during an extended siege was almost impossible, and successful defense of the area was not assured. Accordingly, both sides had the incentive to end the situation quickly and with as little destruction and loss of life as possible. Failure to accept the city's fate increased the likelihood that the city would be subjected to pillage when it finally fell. At one time, the commander of a besieged town was obligated to surrender once further resistance became futile. The Duke of Wellington, writing in 1820, described the practice as follows:

> I believe it has always been understood that the defenders of a fortress stormed have no right to quarter; and the practice, which has prevailed during the last century, of surrendering a fortress when a breach was opened in the body of a place and the counterscarp was blown in, was founded upon this understanding.[5]

Thus, when the walls were breached and successful defense became improbable, if not impossible, the commander was obligated to surrender. Failure to promptly surrender led to a loss of prisoner of war status for the defending forces and increased the likelihood of pillage and plunder by the attackers. Furthermore, a failure to surrender promptly was considered to be a war crime that could subject the commander to punishment by the attacking forces. This is no longer the case. Although failure to admit defeat may occasion reproba-

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[3] One writer has described the summoning process:

> By whatever method a town was ultimately reduced, however, formal protocol demanded that the first step of a commander, whose forces appeared before it, was to send a summons to surrender. A messenger, very likely a herald, would go forward under surety, and formally demand admittance in his master's name. This gave the garrison and the townsmen an opportunity, if they so wished, to make a treaty on the spot. The messenger also gave them due warning of what the consequences of refusing his summons would be, which served as an added inducement to them to make terms. For this part of the message would probably not be very palatable. When Louis de Bourbon appeared before Meléon in Poitou in 1381 he sent his marshal to summon the town, whose captain refused him entry. "Then the marshal replied to them, that since they would not see reason and surrender the fort, let them take warning that there would be no further talk of terms being given; and if they were taken, they would be dealt with so that others would learn by their example, for the Duke of Bourbon would hang every man of them by the neck." The threat so terrified the garrison of the fort that they made terms at once.

M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 120 (1965) (citation omitted).

[4] *See generally* TERENCE WISE, MEDIEVAL WARFARE 161-82 (1976).

[5] *Quoted in* F.E. SMITH & N.W. SIBLEY, INTERNATIONAL LAW AS INTERPRETED DURING THE RUSSO-JAPANESE WAR 71 (1907). Vattel, writing in the mid-eighteenth century, criticized the practice of executing the commander of a besieged city for failing to accept fate and surrender. "What an idea!" he wrote, "To punish a brave man for having performed his duty!" However, Vattel also seemed to recognize that where resistance is hopeless, relief is unavailable, and ultimate victory in the war as a whole is impossible, the commander could be "threatened with death in case of his persisting in a defense which is absolutely fruitless, and which can only tend to the effusion of human blood. Should this make no impression on him, he deserves to suffer the punishment with which he has been justly threatened." DE VATTEL, THE LAW OF NATIONS 349-50 (Joseph Chitty ed. 1859).

tion or even criminal sanction[6] from the commander's own superiors, it is not an offense for which his enemy might exact punishment.[7] Today the denial of quarter is itself a war crime.[8]

Surrender usually meant the complete submission of the military forces defending an area to the enemy.[9] However, when the opposing military forces simply abandoned the city, the city was considered to be undefended and "open." That is, the attacking force could enter the city at will and without fear of attack. Under these circumstances destroying the entire city was unnecessary, although individual military targets in the city might be destroyed, either before or after entry. The force entering the city would become an occupation force and, on entry, the city would be subject to attack by the just departed force. Because a key element of the city's openness was the ability of an attacking force to enter it at will, as a practical matter, only those cities in the actual area of contact of the opposing forces could be legitimately declared to be open.

When the military forces had abandoned the city, the city's civic leaders normally had the burden of meeting with the opposing commander and informing him that the city was open. Accordingly, the mayor of Columbia, South Carolina, went to the Union lines as General Sherman approached the city and informed him that the Confederate forces had left and that the city was open for the Union army's entry.[10] When the Confederate government was forced to abandon Richmond, Virginia, the mayor met the advancing Union forces and informed General Grant's commanders that the city was open. Once the capturing forces entered the city, they were obligated to refrain from looting and pillaging and were responsible for the safety of the city's residents.[11] Nonetheless, war materials still in the city could be destroyed.

Codifying the Rule

In 1874, an effort was made to codify the prior military practice regarding open cities. Draft article 14 of a proposed

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[6]The Uniform Code of Military Justice, *see* UCMJ arts. 1-135 (1988), addresses surrender in two articles. The first applies to the person who actually surrenders:

> "Any member of the armed forces who before or in the presence of the enemy—
>
> (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
>
> (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;
>
> shall be punished by death or such other punishment as a court-martial may direct."

Id. art. 99. An argument can be made that a failure to recognize the hopelessness of resistance "endangers the safety" of a command. That a commander today would face court-martial for simply holding out too long is unlikely. However, in the days when soldiers in a surrendered command were simply paroled and usually given a chance, after exchange, to fight again, the case was somewhat different. The surrender of Confederate General John Pemberton at Vicksburg, Mississippi, is illustrative. Pemberton's command, of some 28,000 men, had been under siege for 47 days when he finally surrendered on July 4, 1863. Five days before the surrender, a note was sent to him, ostensibly from soldiers in his command. (Some believe the note was actually one of many dropped over the Confederate lines by kites sent aloft by the Union navy. If so, this is an early example of psychological warfare.) The note was signed "Many Soldiers." After pointing out that the army was starving, the note said, "If you can't feed us, you had better surrender us, horrible as the idea is, than suffer this noble army to disgrace themselves by desertion. . . . This army is now ripe for mutiny, unless it can be fed." *See* 24 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, pt. 3, 982-83 (1889). Had he surrendered earlier, his command might have been in better physical condition, had better morale, and been a more effective fighting force when finally exchanged. Pemberton never returned to high command and was the subject of intense criticism for his strategic decisions during the Vicksburg campaign.

The second UCMJ article that concerns the soldier who compels the officer in command to surrender, an offense similar to mutiny:

> Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

UCMJ art. 100. The discussion of the offense provides, "If continued battle has become fruitless and it is impossible to communicate with higher authority, those facts will constitute proper authority to surrender." MANUAL FOR COURTS-MARTIAL, United States, pt. IV, ¶ 24(2)(c)(3)(b) (1984).

General Jonathan Wainwright, the United States commander on Corregidor in 1942, surrendered his troops to the commander of the Japanese forces in the Philippines, General Homma. Before so doing, General Wainwright cabled President Roosevelt and General MacArthur and explained his position. To the President he wrote, "There is a limit of human endurance and that limit has long since past [sic]. Without prospect of relief I feel it is my duty to my country and to my gallant troops to end this useless effusion of blood and human sacrifice." To MacArthur, "We have done our full duty for you and for our country. We are sad but unashamed." JONATHAN M. WAINWRIGHT, GENERAL WAINWRIGHT'S STORY 101-02 (Bantam ed. 1986) (1946). General Wainwright spent the rest of the war as a prisoner of war and was awarded the Medal of Honor when released.

[7]GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 303 (1903) ("When in his opinion, it [defense of a place] can no longer be hopefully maintained, any further sacrifice of life is unwarranted, and it becomes his duty to surrender. But this is a duty which he owes to his country and to the men under his command, and not to the enemy."). *Id.* Davis served as The Judge Advocate General of the United States Army and was a delegate to the 1907 Hague Conference.

[8]"It is especially forbidden . . . to declare that no quarter will be given." Hague Regulations, *supra* note 1, art. 23.

[9]Where the submission is effected through an agreement between the opposing forces the act is termed a "capitulation." DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 470 (July 1956) [hereinafter FM 27-10].

[10]Columbia was almost completely destroyed by fire the night that the Union soldiers entered the city. Most historians blame this on Sherman's troops. Sherman later claimed that retreating Confederates set the fires.

[11]VIRGINIUS DABNEY, VIRGINIA, THE OLD DOMINION 350 (1971).

Brussels Convention originally addressed the status of fortified places, the first sentence of which read, "Fortresses or fortified towns are alone liable to be besieged."[12] A second sentence provided, "An entirely open town, which is not defended by hostile troops, and whose inhabitants offer no armed resistance, is free from attack or bombardment."[13] During the discussion of the article, the Belgian delegate proposed that the bombardment of inhabited quarters (*i.e.*, portions of a city in which civilians are present), even in defended towns, be specifically prohibited. The conferees did not go so far. However, during the debate the conferees observed, as a general principle of international law and of the proposed Convention, that commanders of a besieging force would be obligated to respect the private property of inoffensive citizens "as far as local circumstances and the necessities of war will admit."[14] In short, customary international law already prohibited the deliberate bombardment of civilian portions of a city.

As finally adopted, Article 15 of the Brussels Convention contained a new formulation of the rule: "Fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded."[15] The phrase "which are not defended" does not refer to open towns, which, by definition, cannot be defended. The next article makes this clear. Article 16 provides, "But if a town or fortress, agglomeration of dwellings, or village is defended, the officer in command of an attacking force must, before commencing a bombardment, do all in his power to warn the authorities."[16] Note the omission of the modifier "open" before town. The Brussels Convention was never adopted.

Today the world's attention focuses on the war in the former Yugoslavia. In 1972, the International Committee of the Red Cross reported the discovery of the Serbian Ministry of War's 1877 "Rules of the Law of War" in the archives in Belgrade. Coming a few years after the Brussels Conference and some twenty years before the Hague Conference, the rule concerning open towns is an example of the military thinking in the latter half of the nineteenth century. The 1877 Serbian rule states, "Open towns and localities, not defended by the army or by their inhabitants, must not be the object of sieges or bombardments. Only those towns and localities which have been fortified and defended by the army may be the object of attack."[17] The second sentence suggests that even if a place was fortified, it could be attacked only if it also was defended.

The 1899 Hague Regulations provided a better formulation in that it dropped the Brussels reference to open towns and set out a rule which provided, "The attack or bombardment of towns, villages, habitations or buildings which are not defended is prohibited."[18] The rule implied that a place might be immune from attack because it was not defended, even though it was not actually open for occupation by the enemy. The rule could lead to illogical results. A place might be a well stocked military supply point and yet not be defended. Could a place, which is otherwise a legitimate target, be immunized from attack by simply not defending it? Because such a result is illogical, the 1899 provision must be interpreted as referring only to what previously had been known as an "open town," one near the area of contact and open for occupation. The prohibition simply did not include areas outside the fighting.

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[12] 65 BRITISH AND FOREIGN STATE PAPERS 1067, 1081-82 (1873-1874).

[13] *Id.* at 1082.

[14] *Id.* at 1082-83.

[15] SCHINDLER & TOMAN, *supra* note 1, at 29.

[16] *Id.*

[17] *The Law of War in Serbia in 1877*, INT'L REV. RED CROSS, Apr. 1972, at 171, 175. The Serbian Ministry of War was not the only entity codifying the law of war at the time. The Institute of International Law adopted a manual entitled "The Laws of War on Land" in September 1880. Article 32 read:

> It is forbidden:
> (a) To pillage, even towns taken by assault;
> (b) To destroy public or private property, if the destruction is not demanded by an imperative necessity of war;
> (c) To attack or bombard undefended places.

The manual then included an explanatory sentence:

> If it is incontestable that belligerents have a right to resort to bombardment against fortresses and other places in which the enemy is entrenched, considerations of humanity require that this means of coercion be surrounded with certain modifying influences which will restrict as far as possible the effects to the hostile armed force and its means of defense.

Thus, the attacking force must attempt to limit the effects of the attack to military objectives. Article 33 required that "save in cases of 'open' assault" a warning be given. Article 34 required that nonmilitary buildings be spared. *See* INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF WAR ON LAND (OXFORD MANUAL) (Sept. 9, 1880), *reprinted in* SCHINDLER AND TOMAN, *supra* note 1, at 35, 41.

[18] Article 25, Convention with Respect to the Laws and Customs of War on Land, with Annex of Regulations July 26, 1899, 32 Stat. 1803, 1 Bevans 247, replaced by 1907 Hague Conventions, *supra* note 1, *reprinted in* SCHINDLER & TOMAN, *supra* note 1, at 63, 83-84.

By 1907, the advent of airplanes and dirigibles made even places in the interior subject to attack.[19] At the same time artillery was becoming longer range and could extend well beyond the infantry forces. Thus, the delegates to the 1907 Conference added the language, "*by any means whatever*" intending to include the new weaponry. This formulation also failed to solve the problem. As only airplanes or long-range artillery could reach behind the contact area, did this mean that all undefended towns could not be bombed or shelled, even if there were military objectives located in them? As one author described the problem,

> Unless accompanied by its corollary of freedom of entry the exemption [from attack] of the undefended town would lead to the absurd result that a belligerent could secure the immunity of his production centres and lines of communication from lawful bombardment by simply omitting to defend them, and thus could concentrate all his arms for attack.[20]

The 1907 Convention likewise specifically created certain duties for the commander who conducts a siege or bombardment. Article 26 requires that the commander, "before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities."[21] "Assault" is interpreted to mean an attack in which surprise is crucial to its success.[22] The requirement to warn was the subject of a claim against Germany brought after World War I. In January 1916, German airplanes bombarded Salonica, Greece, before Greece had entered the war. The planes were at an altitude of 3000 meters and attacked at night. The plaintiffs' store of coffee was destroyed by the aerial bombardment and, after the war, they brought a claim for the loss. To recover, the plaintiffs had to prove that the bombardment was a violation of international law. The plaintiffs first argued that because Greece was a neutral state at the time of the attack, its bombardment was illegal. The Tribunal rejected this position because Allied forces were in Salonica when the attack occurred and they were a lawful object of attack. The Tribunal then considered the method of the attack. Germany had not given the warning required by Article 26 and the Tribunal held that the failure to give a warning violated the law of war. The Tribunal recognized that Article 26 contemplated only land bombardment and described its intention as enabling "the authorities of the town thus threatened either to evade bombardment by offering capitulation or to order the evacuation of the population."[23] The Tribunal then held

> The argument of the defendant State that bombardment from the air must necessarily be a surprise attack may be correct from a military point of view, but this does not imply that bombardment without warning ought to be permitted. On the contrary, the implication is that such bombardment is generally inadmissible. In consequence, the bombing of Salonica, in the circumstances described, was contrary to international law, Germany was liable for the damage caused by the bombardment.[24]

This case is instructive. Salonica was not a location in which opposing ground forces were in contact and, therefore, could not fall within the traditional concept of an open town or an undefended place. Technically, it was even considered neutral territory. The Tribunal held that, but for the failure to warn, the bombardment would have been lawful. By implication, the Tribunal recognized that military targets, even those behind the front lines, are lawful objects of attack. Perhaps the Tribunal simply believed that the aircraft who bombed Salonica were actually not threatened by defensive fires. The altitude of the aircraft and that the attack took place at night would have made it difficult to successfully target the bombers from the ground. The overall circumstances of the attack diminished the claimed need for surprise.

The commander also is required to avoid damage to particular buildings located within the area that is being besieged or bombarded. Article 27 requires,

> In sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the

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[19] The delegates to the 1899 Conference adopted a declaration forbidding the dropping of explosives from balloons for five years. The 1907 Conference agreed to extend the prohibition until the end of a planned third conference. However, the third conference was never held—World War I intervened. In any event, both declarations addressed the means and methods of combat (dropping explosives from balloons), not the place on which something might be dropped. Having outlawed bombing from the air completely, the conferees may well have felt that it was unnecessary to address the status of a place on the ground, defended or undefended. The attempt to prohibit bombing failed. The current Army law of war manual provides, "There is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate military objectives." FM 27-10, *supra* note 9, para. 42.

[20] R.Y. Jennings, *Open Towns*, XXII BRIT. Y.B. INT'L L. 258, 260-261 (1945).

[21] Hague Regulations, *supra* note 1, art. 26. The United States Army interprets the warning requirement as referring "only to bombardments of places where parts of the civilian population remain." FM 27-10, *supra* note 9, para. 43.

[22] Hague Regulations, *supra* note 1, art. 26.

[23] Coenca Brothers v. Germany (1927), *in* ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 570, 572 (McNair & Lauterpact, eds., London 1931).

[24] *Id.*

> sick and wounded are collected, provided that they are not being used for military purposes.
>
> It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.[25]

Article 27 formalized the Brussels conferees' position regarding a general obligation to refrain from deliberately attacking certain nonmilitary targets even when they are located inside a besieged city. Article 27 listed specific buildings that placed a higher duty of care on the attacker. However, as written, Article 27 does not apply to damage that might be inflicted on parts of a city in which civilians are present but which do not contain the specified structures. Oddly, Article 27 left civilians inside a besieged city legally less protected—at least in so far as the specific Article is concerned—than the buildings in which they might be found. Whatever protection civilians received came from the customary law of war, the continued relevance of which was set out in the Preamble to the 1907 Convention:

> [T]he High Contracting Parties deem it expedient to declare that . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.[26]

But was this general statement of civilian protection enough? World War I demonstrated the need for new rules specifically addressing the tactics and strategy of air warfare. World War I saw the beginnings of strategic bombing. Its inaccuracy led inevitably to claims that the airplane's real target was quite often civilians, their property, or their morale. In some cases the claims were valid.[27]

In 1923, another conference was held to formulate specific rules for aerial warfare. This time the delegates attempted to avoid the previous problems with semantics by not using the terms "undefended" or "open" cities. Historically, these terms had applied only to places open to enemy occupation and, obviously, territory could not be occupied from the air. The new approach was to list the targets against which force might be lawfully used. In today's terminology, the delegates set out a list of "military objectives," against which any aerial bombardment must be "exclusively" directed. Subparagraph (2) of Article 24 contained this list as "military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes." Additionally, the drafters forthrightly, and naively, attempted to create a rule prohibiting other aerial bombardment, as follows:

> (3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.
>
> (4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard for the danger thus caused to the civilian population.[28]

The 1923 rules did not address the warning requirement. Instead, they simply forbade the bombardment of places outside the combat zone (unless military objectives located therein could be specifically bombed) and cautioned the commander to take into account the "danger" caused the civilian population when contemplating a bombardment of a place in the combat zone. Perhaps the drafters believed that any place near the combat zone already would be sufficiently devoid of civilians. The problem was that both rules tilt the scale too much in favor of the target state. In areas outside the combat zone, the target state could gain some immunity for what would otherwise be lawful military objectives by simply surrounding them with civilians. Near the front, the target state could simply prohibit civilians from leaving. As one author noted, the problem with the proposed rule was that it was "dependent upon effect or result rather than intent"[29] and, of course, the effect could be known only after the attack.

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[25] Hague Regulations, *supra* note 1.

[26] *Id.*

[27] Two German lieutenants were captured and interrogated by the British after a bombing raid in London on December 5, 1917. Their targets were proper military objectives. However, they also made it clear that, even when they missed the intended target, it was of no concern because the morale of the civilian population also was a legitimate objective. GEOFFREY BEST, HUMANITY IN WARFARE 269 (1980).

[28] Article 24, 1923 Hague Rules of Air Warfare, *reprinted in* SCHINDLER & TOMAN, *supra* note 1 at 207, 210.

[29] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 34 (1990) ("There are at least two difficulties with the rule. . . . The first is that it placed a burden to avoid indiscriminate attack upon the attacker, even though the means that might lead to an 'indiscriminate attack' were not within his exclusive control. The second concerns the potential for assessment of an attack based on results rather than intent, a concept seriously flawed. . . .").

World War II

The 1923 Rules never were adopted. Applying the 1923 Hague Rules as written would have prohibited most bombardment outside the combat zone.[30] The exception would have been where the target was a proper military objective located away from populated areas. Few World War II targets met both parts of this test. The result was that the confused status of the law pertaining to air warfare continued during World War II. During the war all parties engaged in "target area bombing." This amounted to saturation bombing of large areas. Early in the war the bombing of cities was justified as a lawful reprisal. Gradually, the practice was explained, if not justified, as the only way to destroy legitimate military objectives that were dispersed throughout a city.

One way to minimize the impact of bombardment on noncombatants was to issue a warning. One authority describes the World War II warning practice as follows:

> Warning was not normally given before objectives in enemy territory were attacked. It was given, on the other hand, in many instances of attacks on objectives in enemy occupied territory. The purpose was, of course, to enable the local inhabitants, who were "friends," to leave the target area. A general warning was also issued once or twice towards the end of the war in Europe to the foreign workers in the Ruhr to keep away from the factories and railways.[31]

World War II also saw the application of the traditional tests for open cities. Paris was declared an open city in June 1940. The French forces abandoned the city, the French commander notified the Germans that the city was officially open for their entry, and the Germans entered and occupied the city. The proximity of the German forces to Paris made it a logical candidate for "open city" status.[32]

Manila was not so lucky. As the Japanese forces approached Manila, General Douglas MacArthur declared it to be an "open city" on December 26, 1941. MacArthur announced that no military activities were taking place in Manila. However, MacArthur's defensive lines were around the city and it was clearly not open to Japanese entry. The Japanese attempted to limit their bombardment to lawful military objectives inside the city, at least initially. The American and Filipino forces defending Manila were ordered to block the Japanese advance and, "when forced to do so," withdraw past Manila and join other American forces north of the city. The problem was that "[s]ince Manila was used as a base of supplies, and since a U.S. Army headquarters was based in the city and troops passed through it after 26 December . . . it is difficult to see how Manila could be considered an open city between 26 and 31 December 1941."[33] What MacArthur probably intended (or hoped) was that Manila might be spared because it was a historic city and the cultural center of the country. After the war, the Japanese commander, General Homma, was tried by a United States military commission for various war crimes. The prosecutor's theory was that as the commander, he was responsible for the excesses of his troops, including the Bataan Death March and the violation of Manila's status as an open city. He was convicted, sentenced to death, and executed.[34]

Rome was the historic, cultural, and religious center of Europe. In late July 1943, the Italian government unilaterally announced that Rome was an open city. The Allies rejected this declaration for the sound reason that the Germans, not the Italians, actually controlled Rome. At the time, German forces were scattered throughout Rome. However, the Allies were not yet in position to actually enter the city. Again, what the Italian government probably hoped was that Rome might be spared air attack by reminding the Allies that the city was the site of many irreplaceable monuments and artifacts.

In the early spring of 1944, the Vatican secured from the German forces an agreement to spare both the Vatican and Rome's cultural and historic monuments. Thereafter, German convoys were routed around the city and all German military personnel were ordered to leave the city with the exception of medical and quartermaster detachments necessary for the care and feeding of the population. In April, the government of neutral Ireland requested from President Roosevelt a guarantee that Rome would be spared. Roosevelt responded that as Rome was still controlled by the Germans, only the Germans

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[30] *Id.* at 35 ("The 1923 Hague Air Rules suffered an ignominious death, doomed from the outset by language that established rules for black-and-white situations in a combat environment permeated by shades of gray."). One writer has suggested that, to be lawful, target area bombing must meet three tests. First, there must be legitimate military objectives within the target area. Second, the attacker must employ the weapons and ordnance that has the greatest specificity (*i.e.*, would minimize collateral damage). Third, the resulting damage to noncombatants and their property must not be disproportionate to the advantage to be gained by the attack. Kenneth A. Raby, Bombardment of Land Targets—Military Necessity and Proportionality Interpellated 67-71 (1968) (unpublished thesis on file at The Judge Advocate General's School, Charlottesville, Virginia).

[31] J. SPAIGHT, AIR POWER AND WAR RIGHTS 242 (3d ed., London, 1947). Warnings could have some military merit. A general warning that an attack will occur against a particular type of target at some point in the future might make civilians and even military personnel in the target area think about whether that place is really where they want to be.

[32] Jennings, *supra* note 20, at 258.

[33] LOUIS MORTON, THE UNITED STATES ARMY IN WORLD WAR II, THE FALL OF THE PHILIPPINES 165 n.18 (1953).

[34] HOWARD S. LEVIE, TERRORISM IN WAR, THE LAW OF WAR CRIMES 165 (1993).

could be responsible for its safety. In other words, if the Germans chose to defend the city, the Allies would take whatever action might be militarily necessary to defeat them.[35]

In June 1944, when the Allies reached the vicinity of Rome, the German commander, General Kesselring, proposed, through the Vatican, that the Allies "confirm" the status of Rome as an open city. The Germans may have hoped that, once the Allies recognized and agreed to this status, the Allies would not subsequently use Rome for military purposes. The Allies did not respond to the German request and the Germans finally issued a unilateral declaration that Rome was an open city. By then the Allies were at Rome's gates and the declaration actually amounted to an anticipatory surrender of the city to the Allies. Nonetheless, the concern remained that the bridges over the Tiber River might be destroyed to delay the American entry into the city, an action that would have threatened its status as an open city. However, the Germans did not destroy the bridges. Hitler personally forbade the destruction and directed that Rome "because of its status as a place of culture must not become the scene of combat operations."[36] Mark Clark's Fifth Army entered Rome on June 4, 1944. Clark did not place maneuver units in the city. Only hospitals, transit camps, and military recreational facilities were located in Rome. Rome, therefore, continued its quasi open city status—its value to the Allies more political than military.[37]

Other cities and towns were declared to be open during World War II.[38] Paris clearly met the traditional test, while Manila just as obviously did not. Rome met the traditional test, but only at the last minute. World War II is instructive because of the targeting limitations accompanying open city status. Actually, what the World War II open city declarant most often intended to say was, "There are no military objectives in this place and its shelling is unnecessary," or, perhaps more accurately, "There are so many historic and cultural places in this city that attacking even military objectives located in it would result in widespread destruction, either of the city as a whole or its important monuments, and should not be attempted." Deliberately shelling nonmilitary objectives would have been illegal under customary international law anyway. However, a risk of incidental or collateral damage to nonmilitary objectives during a bombardment always exists.

Postwar Codification

The 1949 Geneva Conventions do not directly address these targeting issues. However, Articles 14 and 15 of the Civilian Convention[39] deal with zones in which those who take no part in the hostilities might be protected. Article 14 provides for the establishment of hospital and safety zones where the wounded and sick could be treated. These are to be established outside the combat zone and must be recognized by the enemy through an agreement. Article 15 provides for the establishment of "neutralized zones." Civilians, who take no part in the war effort, as well as the sick and wounded, could be sheltered in a neutralized zone. Neutralized zones are temporary and normally are established in or near the combat area. Again, both sides must agree to the creation of the zone. However, these zones are not required to be open to enemy occupation. Hospital and safety zones are located outside the combat area and rarely would be open to enemy occupation. There is only a requirement that they not be deliberately targeted.

The 1956 United States Army manual on the law of war, *Department of the Army Field Manual 27-10, The Law of Land Warfare*[40] (*FM 27-10*), directly addressed the issue in a paragraph entitled "Bombardment of Undefended Places Forbidden." Paragraph 39 of *FM 27-10* repeated the language of Article 25 of the 1907 Regulations. To clarify the issue *FM 27-10* then simply listed examples of "defended places" in paragraph 40 as follows:

> a. A fort or a fortified place.
>
> b. A city or town surrounded by detached defense positions, which is considered jointly with such defense positions as an indivisible whole.

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[35] ERNEST F. FISHER, JR., THE UNITED STATES ARMY IN WORLD WAR II, CASSINO TO THE ALPS 203-10 (1977).

[36] *Id.*

[37] *Id.* at 234. In late June 1944, Kesselring declared Florence to be an open city and ordered his army out of the city. The declaration was communicated to the Allies through the Vatican. The Allies again failed to respond. As the Allies approached Florence the Germans destroyed all but one of the bridges in or near it. The last German troops left Florence on August 7, 1944. *Id.* at 293.

[38] "When the invasion of Yugoslavia was imminent the Yugoslav government declared Belgrade, Zagreb, and Ljubliana open cities, but Belgrade was heavily bombed by the Germans shortly after the declaration." Jennings, *supra* note 20, at 259. The German Foreign Office announced the German view as to open cities and explained why Belgrade did not qualify:

> The qualifications of an open city [are] (1) no military garrison, (2) no installations of military significance, (3) transport facilities may not be used for military purposes, and (4) the city must be open for entry and passage by enemy troops without molestation. Belgrade, in addition to being a fortress, was actually a seat of great military importance and . . . one proof of its failure to meet the requirements of an open city was the erection and use by the Serbian army of a pontoon bridge there.

German Foreign Ministry Statement, Apr. 10, 1941, *reprinted in* Conduct of Hostilities, 10 WHITEMAN DIGEST § 13, at 436. Brussels also had been declared an open city on May 10, 1940. On May 15, 1940, the German Foreign Office announced that because troops and military transports were observed passing through Brussels, the Germans would no longer respect its status as an open city. *Id.*

[39] Geneva Convention of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilians Convention], *reprinted in* SCHINDLER & TOMAN, *supra* note 1, at 495.

[40] FM 27-10, *supra* note 9.

c. A place which is occupied by a combatant military force or through which such a force is passing. The occupation of such a place by medical units is not sufficient to make it a defended place. Factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops may also be attacked and bombarded even though they are not defended.[41]

The unpublished annotation to *FM 27-10* states that "in modern warfare, it is unduly restrictive to state that only defended places may be attacked and bombarded, as the activities enumerated in the second paragraph [paragraph 40] have and will continue to be legitimate targets for aerial attack and for attack from the ground by conventional artillery, rockets, and guided missiles."[42]

Thus, while the 1907 Convention prohibited the attack of undefended places, *FM 27-10* provided a list of characteristics, the presence of which would make the location defended.

In 1976, *FM 27-10* was changed.[43] Paragraph 39a again repeated the text of Article 25 of the 1907 Convention. In paragraph 39b the change added an interpretation of the treaty language. Paragraph 39b provides that for a place to fall within the protections of Article 25—that is, be undefended—it must be an "inhabited place near or in the zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance."[44] The paragraph then adds four conditions that "should be fulfilled":

(1) Armed forces and all other combatants, as well as mobile weapons and mobile equipment, must have been evacuated, or otherwise neutralized;

(2) no hostile use shall be made of fixed military installations or establishments;

(3) no acts of warfare shall be committed by the authorities or by the population; and

(4) no activities in support of military operations shall be undertaken.[45]

The new revised paragraph 40 is entitled "Permissible Objects of Attack or Bombardment." Paragraph 40a sets out the customary international law prohibition against "the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such."[46] In paragraph 40b, *FM 27-10* sets out examples of defended places outside the proscription of Article 25 that are "permissible objects of attack (including bombardment)." These include the following:

(1) A fort or a fortified place.

(2) A place that is occupied by a combatant military force or through which such a force is passing. The occupation of a place by medical units alone, however, is not sufficient to render it a permissible object of attack.

(3) A city or town surrounded by detached defense positions, if under the circumstances the city or town can be considered jointly with such defense positions as an indivisible whole.[47]

Thus, paragraph 39b provides the general criteria to be considered in determining whether a place meets the test of Article 25 and is, thereby, legally immune from attack as an undefended place. Paragraph 40b lists general characteristics which will make a place "defended" and subject to attack. Paragraph 40c then fills in any possible gap by providing that military objectives are permissible objects of attack. Military objectives are described as "those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. . . ."[48] Unfortunate-

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[41] *Id.* para. 40.

[42] Unpublished annotation to *FM 27-10* (available in the library of The Judge Advocate General's School, Charlottesville, Virginia).

[43] *See* FM 27-10, *supra* note 9 (C1, 15 July 1976).

[44] *Id.* para. 39b (C1, 15 July 1976).

[45] *Id.*

[46] *Id.* para. 40a (C1, 15 July 1976).

[47] *Id.* para. 40b (C1, 15 July 1976).

[48] *Id.* para. 40c (C1, 15 July 1976).

ly, the final sentence of paragraph 40c again refers to Article 25 and provides that "cities, towns, villages, dwellings or buildings which may be classified as military objectives, but which are undefended (para 39b), are not permissible objects of attack."[49] This is nothing more than reinforcement of the basic rule, but it could lead to confusion. Given that one of the requirements for a military objective is that it "make an *effective* contribution to military action," it is difficult to see how such a place could also meet the requirements set out for an undefended place. The second requirement for a military objective may help solve the problem. Even if the place or thing does make an effective contribution to the enemy's war effort, its capture, destruction, neutralization, or targeting must offer the attacker a definite military advantage "in the circumstances ruling at the time."

The 1977 Protocols, not yet ratified by the United States,[50] include the most recent attempt to define these immunized locations. Adopting completely new terminology, Article 59 refers to "Non-defended localities."[51] Paragraph 1 provides, "It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities."[52] Paragraph 2 defines "non-defended localities" as follows:

> The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by the adverse Party. Such a locality shall fulfil the following conditions:
>
> (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
>
> (b) no hostile use shall be made of fixed military installations or establishments;
>
> (c) no acts of hostility shall be committed by the authorities or by the population;
>
> (d) no activities in support of military operations shall be undertaken.[53]

Again, a major component of the definition is that the place be open for occupation and that this be declared to the other side. Note that while *FM 27-10* provided only that the conditions set out in paragraph 39a "should be fulfilled," the Protocol uses the mandatory words "shall fulfil" the conditions. The Department of Defense (DOD) Commentary to the Protocols, prepared in anticipation of the United States delegate's signature on the final draft of the Protocols, describes the effect of Article 59:

> The strict conditions in paragraph 2, if met and maintained, would normally mean the absence of significant military objectives. Such an inhabited area could be unilaterally declared to be "undefended" if the conditions in para 2 were met *and* if the inhabited place was in a "zone where armed forces are in contact which is open for occupation by an adverse party." Failure to maintain the conditions would result in the loss of protection. . . .[54]

Today, only places open to occupation by the opposing force qualify either as an open city (by historical practice), as an undefended place (by Hague treaty interpretation), or as a nondefended locality (by clear Protocol treaty language). The DOD Commentary to the Protocols states that Article 59 is "extremely beneficial" because "it adopts the long held U.S. view that existing international law does not preclude air attacks against military objectives in the heartland even though such cities are not 'defended' from air attack."[55] However, regardless of a place's location vis-a-vis the actual fighting, only military objectives can be lawfully attacked.

Applying the Rule: The Siege of Sarajevo

True sieges are rare in modern warfare. Fast moving fronts mean that towns simply are abandoned to the enemy in the hopes of fighting again on different ground or of later retaking the area. However, Sarajevo has been under siege by an army of Bosnian Serbs (Serbs) since April 1992.[56] The city is not open to occupation and, obviously, is the scene of military

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[49] *Id.*

[50] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], *reprinted in* SCHINDLER & TOMAN, *supra* note 1, at 621.

[51] Protocol Additional, *supra* note 47, art. 59.

[52] *Id.* para. 1.

[53] *Id.* para. 2.

[54] Memorandum for the Chairman of the Joint Chiefs of Staff, subject: Protocols I and II-Humanitarian Law during Armed Conflict, I-59-3 (7 Nov. 1977). Available at The Judge Advocate General's School, Charlottesville, Virginia.

[55] *Id.*

[56] The military events described here are taken largely from the report provided the United Nations Secretary General by a Commission established pursuant to Security Council resolution to investigate war crimes in the former Yugoslavia. Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, 43-49, S/1994/674 (27 May 1994) [hereinafter Secretary-General Letter].

operations. A Bosnian Corps headquarters is located inside the city. The city is surrounded by well-placed and well-hidden Serbian tanks and artillery.[57] The Serbs have superior firepower. However, the Bosnians have more troops. To take the city, the Serbs would likely have to resort to a house-to-house struggle against a numerically superior force in an urban area, a fight that certainly would result in a large number of casualties. Rather than attempt such a fight, the Serbs have resorted to siege warfare. A major component of the siege has been constant artillery fire into the city. At one time the number of shells ranged from 200 to 1000 per day.[58]

Observers have reported that the Serbs have engaged in specific targeting. The targets include a hospital, communications facilities, public transportation, government buildings, a brewery and flour mill, cemeteries, mosques, and residential areas. Additionally, the Serbs have randomly shelled civilian areas throughout the city. In one attack, in early February 1994, sixty-eight civilians were killed when a mortar shell landed in a crowded market. The shelling of civilian areas is apparently motivated by a desire to terrorize the city into surrendering.[59]

Currently, Sarajevo does not meet the traditional test for an open city. Troops are located inside its boundaries and the Serb forces cannot enter freely and occupy the city. Furthermore, neither the civilian or military leaders have made a sincere effort to declare the city "open," as that term is used in the law of war.[60] For the same reasons, Sarajevo also fails any of the tests for an undefended place. Not only is it militarily defended, but it is exactly where the opposing forces are in contact. Even under the most restrictive interpretation of the rules for bombardment of an undefended place (*i.e.*, a place outside the combat area cannot be attacked), Sarajevo (a place that *is* the center of the combat area) simply cannot meet the test. Finally, Sarajevo cannot meet the Protocol's test for a nondefended locality so long as Bosnian forces remain and continue to defend it. Thus, we can conclude that the siege of Sarajevo, and the concomitant bombardment of military objectives, is lawful. However, this does not mean that all the tactics employed in the conduct of that siege are lawful.[61]

The obligation to employ discrimination in targeting is not diminished simply because a place is lawfully besieged. The indiscriminate shelling of residential areas of the city violates the fundamental precepts of the law of war. As the delegates to the Brussels Convention recognized even in 1874, shelling civilian areas violates the accepted customary law rule providing a general immunity from shelling to noncombatants. This general prohibition is reflected in Article 51 of the 1977 Protocols entitled "Protection of the Civilian Population."[62] Similarly, Article 48 of Protocol I provides "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[63] Regardless that the Protocols may not reflect customary international law in their entirety, the requirement to avoid deliberate harm to civilians certainly is a rule of customary law.[64]

The Hague requirement for a warning before a bombardment probably does not technically apply to a siege situation.[65] The civilian inhabitants of Sarajevo surely know that they are caught in the center of military operations. However, given that much of the population is unable to leave the city, there would seem to be no reason not to give the people at

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[57] After a mortar attack on a crowded market in early February, in which 68 civilians were killed, NATO forced the Serbs to withdraw their heavy weapons from a 12-mile wide exclusion zone around the city. The heavy weapons have apparently returned to the exclusion zone. In the late October and early fall of 1994, attacks from heavy weapons increased, leaving eight dead and 47 wounded. Joel Brand, *Bitter Sarajevans Mourn 5 Civilians Killed*, WASH. POST, Nov. 10, 1994, at A49.

[58] *See* Secretary-General Letter, *supra* note 56.

[59] Brand, *supra* note 57, at A49.

[60] In January 1993, the French Foreign Minister attempted to get the warring factions to agree to declare Sarajevo an "open city." However, apparently what he actually anticipated was a city "completely demilitarized in order to gain immunity from bombardment and attack." *Dumas Reports Deal to Make Sarajevo "Open City,"* AGENCE FRANCE PRESS, Jan. 6, 1993, *available in* LEXIS, Nexis Library, Current News File. This would technically not make Sarajevo an open city because the intention was that no military forces would be present. However, if demilitarized, no reason would exist to attack or bombard it and to do so would be at least a violation of the customary law of war. Perhaps what was actually hoped for was a status akin to that of Rome in World War II. In any event, the attempt failed.

[61] This is not to mean that the lawfulness of the conflict per se is somehow affected by whether the siege is lawful. An entirely different set of standards determines the answer to that question. Instead, this article limits itself to the lawfulness of sieges as a *method* of warfare (just *conduct* in war, *Jus in bello*) and not to the underlying issue of whether the conflict itself is lawful (just recourse to war, *Jus ad bellum*).

[62] "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Article 51, para. 2, Protocol I, *supra* note 39.

[63] *Id.*

[64] "Customary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such." FM 27-10, *supra* note 9, para. 40 (C1, 15 July 1976).

[65]
> The very fact of war is a sufficient notice to the non-combatant inhabitants of such places [*i.e.*, places under siege] that an attack is at least a probable contingency. If they continue their residency it is presumed that they do so with full knowledge that the place may become the centre of military operations.

DAVIS, *supra* note 7, at 302.

least a generic warning that certain places are military objectives and that noncombatants should avoid them. The failure to give such a warning is strong evidence that the Serbian commander intends to deliberately inflict casualties on the civilian population, which would be a violation of the law of war.

The Serb forces also have violated the requirement that in sieges "all necessary measures must be taken to spare" particular buildings. Thus, the deliberate shelling of a hospital, religious buildings, and monuments is a violation of Article 27 of the Hague Regulations.

The Geneva Civilians Convention also prohibits shelling a civilian hospital. Article 18 states that civilian hospitals "may *in no circumstances* be the object of attack. . . ."[66] This is one of the few clear target prohibitions set out in the 1949 Geneva Conventions. Article 18 also requires that civilian hospitals be marked with a protected emblem (*e.g.*, the Red Cross or Red Crescent). However, the building derives its protected status from its function, not its marking. Even if a hospital was not marked, the attacking commander would violate the law of war if he attacked a building known to be serving as a hospital (unless it also is being misused for hostile military purposes). The Official Commentary to the Convention states that the prohibition on attacks refers primarily to attacks deliberately directed against hospitals and that the rule specifically forbidding the attack of hospitals was included because of the danger of damage to hospitals by air attack.[67] In short, the drafter's intent was to require an attacker to take extra precautions when hospitals are in the target area. A similar rule applies to military hospitals.[68]

In this author's opinion, however, the Geneva Civilians Convention (other than the articles discussed above) is of limited applicability in a siege. The Civilians Convention covers only a particular class of persons called "protected persons." Generally, only persons who are in the control of their enemy meet the definition of a protected person and the Sarajevans are not yet in Serb control and are actively resisting such control. If the siege ends and Sarajevo is occupied by the Serbs then the Sarajevans would become "protected" by the Civilians Convention.

Sarajevo under siege should not be viewed as a coherent whole in which everything inside can be targeted. As indicated by the Protocol provisions mentioned above, where a place is large enough that a distinction can be made between military and nonmilitary items, an attacker is obligated to make that distinction. Reports of Serbian tactics employed around Sarajevo clearly support a charge that they are violating the law of war by targeting civilians and nonmilitary objectives.[69]

Snipers who shoot at persons see their targets. It is difficult to believe that a sniper cannot distinguish between a small child and a member of the opposing armed forces.[70] Where the defendant soldier/sniper actually saw his target before pulling the trigger, the prosecution has a strong prima facie case that the requisite target discrimination did not take place. That the victims and their property lie inside a besieged area does not vitiate the crime.

Conclusion

The law sets out certain conditions that must be met before a place can gain the special status of being an "open city" or an undefended place. The law also recognizes the lawfulness of sieges. However, in all cases, adherence to the law is required. Only military objectives can be lawfully targeted. In sieges, civilians almost always will suffer, often more than the military forces who are resisting the siege. Nonetheless, attacking military forces are required to refrain from deliberately targeting civilians and nonmilitary objectives. Where there is evidence that war crimes have occurred, every nation must aid in punishing the perpetrators. At the close of World War II, an American war crimes tribunal succinctly stated the rationale for punishing those who commit war crimes:

> Unless civilization is to give way to barbarism in the conduct of war, crime must be punished.[71]

The rationale remains as valid today as it was fifty years ago.

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[66] Civilians Convention, *supra* note 39 (emphasis added).

[67] JEAN PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 147 (1958).

[68] Article 19, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* SCHINDLER & TOMAN, *supra* note 1, at 373, 382.

[69] In commenting on a November 8, 1994, attack by heavy weapons which killed several children, a spokesman for the United Nations Command described the attack as a premeditated strike against civilians and said, "It was deliberate. . . . Three shells from different weapons, all in the same afternoon. There is no question about that." Brand, *supra* note 57. However, two days later, after an investigation of the attack, the United Nations Command concluded that "two of the shells could have been fired from the government-held [Bosnian] part of the city." If so, the Bosnian government's intent was apparently to force either the United Nations or NATO forces to retaliate against the Serbian artillery positions. Joel Brand, *Serbs' Cross-Border Airstrike on Bosnia Leaves U.N., NATO Frustrated*, WASH. POST, Nov. 11, 1994, at A40. Would such an act constitute a war crime? The victims are besieged citizens who are attacked by the besieged government. It certainly must constitute murder under Bosnian law. But the law of war does not normally protect persons from their own government.

[70] A three-year-old child, hit by a sniper's bullet, was the subject of a column in a Sarajevan newspaper. ZLATKO DIZDAREVIC, SARAJEVO: A WAR JOURNAL 15 (1993). Dizdarevic's book is a collection of his columns published during the siege of Sarajevo. "Sniping and shrapnel killed four people and wounded seven in Sarajevo. . . . The dead included three children. . . . Five children were wounded in the fighting. . . ." *Children Killed in Sarajevo*, WASH. POST, Nov. 9, 1994, at A44.

[71] United States v. List, XI TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NUMBER 10, a 1254 (1950).

Warriors on the Fire Line: The Deployment of Service Members to Fight Fire in the United States

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Introduction

FT. ORD, Calif.—Hundreds of troops from the U.S. Army's rapid deployment forces were moving out Sunday night to face their first enemy, but they were going by bus, leaving their weapons behind and under orders to run if things get too hot.[1]

—Los Angeles Times, September 7, 1987

By the time this article ran, the soldiers from Fort Ord's 7th Infantry Division were helping to save some 12,000 acres of burning forest in Oregon.[2] These types of support operations are hardly new.[3] However, with the end of the Cold War, America has increasingly relied on its military to do more than the basic mission, which is to "fight or be ready to fight wars should the occasion arise."[4] Accordingly, a commander must anticipate and prepare for a continuing mission to provide this type of military support to civil authorities (MSCA) in the future.

This article will first provide a historical backdrop to the idea of military assistance to civilian firefighters, then catalogue the statutory authority for such assistance, and, lastly, analyze the regulatory framework under which service members assist in suppressing forest and wild fires.

Background

Few people actually see a forest fire run wild; it is an awesome sight. Smoke columns can rise to 50,000 feet, and may become so dense that they block out the sun. Surface winds created by rising air currents may exceed 100 miles per hour. . . . Among such fires was . . . the Great Idaho Fire of 1910. Burning from the Canadian border to the Salmon River, this fire desolated a semicircle of forest lands 160 miles long and 50 miles wide. It destroyed 3 million acres of timber, 4 towns, and took possibly 100 lives. In a period of just 48 hours, [this] fire changed the weather across the United States.[5]

The Great Idaho Fire and others like it served as catalysts for forest protection in this country. In the early part of the century, they spawned state forest protection codes and the growth of a national forest system.[6] Yet in spite of such protections, "since World War II, millions of acres of the nation's forest lands have been touched by forest fires."[7]

The primary responsibility for combatting forest fires rests with state and federal civilian agencies.[8] However, when civilian assets prove insufficient, the military may assist.[9] In the last decade, service members have repeatedly deployed to assist in fire fighting efforts.

In the spring of 1985, Marines and equipment from Camp Lejeune, North Carolina, helped to contain wildfires that had earlier destroyed over 92,000 acres in North Carolina.[10] During September 1987, 1000 soldiers from Fort Ord, California, helped to fight fires that were ravaging forests in California,

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[1] Tamara Jones, *It's Their Baptism of Fire, 650 Troops Dig in to Battle Burning Forests*, L.A. TIMES, Sept. 7, 1987, § 1, at 18.

[2] *Id.*

[3] *See generally* DEP'T OF ARMY, FIELD MANUAL 100-19, DOMESTIC SUPPORT OPERATIONS, Introduction, (1 July 1993) [hereinafter FM 100-19] (stating that the Army has routinely provided support to state and territorial governors since the founding of this nation).

[4] Colonel Charles J. Dunlap, Jr., United States Air Force, *The Last American Warrior: Non-traditional Missions and the Decline of the U.S. Armed Forces*, 18 FLETCHER F. WORLD AFF., Winter/Spring 1994, at 65 (citing United States v. ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[5] Norman J. Wiener, *Uncle Sam and Forest Fires: His Rights and Responsibilities*, 15 ENVTL. L. 623, 624 (1985).

[6] *Id.* at 625 (citing Oregon Forest Production Act, 1911 Or. Laws ch. 278; H. STEEN, THE U.S. FOREST SERVICE: A HISTORY 174 (1976)).

[7] Wiener, *supra* note 5, at 625 (citing Towell, *Disaster Fires—Why?*, AM. FORESTS, June 1969, at 13.

[8] DEP'T OF DEFENSE, MANUAL 3025.1M, MANUAL FOR CIVIL EMERGENCIES 1-11 (June, 1994) [hereinafter DOD MANUAL 3025.1M]. ("The military role in disasters is one of support to a lead Federal Agency. . . . First responsibility for disaster response is with the State in which the disaster occurs. Federal assistance is initiated when a disaster is so severe that a State's ability to provide response is overcome.") *Id.*

[9] *Id.*

[10] *Firefighters Contain Brush Blazes in N.C.*, BOSTON GLOBE, Apr. 9, 1985, at 8.

Washington, and Oregon.[11] The following summer—from 20 August through 30 September 1988—almost 4200 personnel from all four services formed Joint Task Force Yellowstone and assisted in extinguishing fires that were consuming Yellowstone National Park, Wyoming.[12] In 1990, 1200 soldiers from Colorado, stationed with Fort Carson's 4th Infantry Division, helped battle blazes in California.[13] Another 1200 from Fort Lewis, Washington, fought fires in Oregon.[14] Most recently, in July and August of 1994, approximately 3000 Marines from Camp Pendleton, California, along with 1000 soldiers from Fort Hood, Texas, fought fires in California and Washington.[15] Apparently, fighting fires is a growth business for America's military services.[16]

Yet many critics argue that disaster relief—along with most other Operations Other Than War (OOTW)—is draining the life from an ever-shrinking military.[17] That argument appears to be falling on deaf ears. The current Chairman of the Joint Chiefs of Staff, General John Shalikashvili, "embraces these nontraditional enterprises,"[18] and MSCA currently forms an integral part of United States military doctrine.[19] Apparently, it is here to stay.

Statutory Authority

The Robert T. Stafford Disaster Relief Act of 1974 (Stafford Act)[20]

The Stafford Act, as amended, is the primary authority for military participation in disaster relief. It authorizes the Department of Defense (DOD) to provide personnel, equipment, supplies, facilities, and managerial, technical, and advisory services in support of local assistance efforts.[21] Under the Stafford Act, the military may assist in disaster relief, to include fire fighting, when one of three conditions exists.

First, the President may declare a "major disaster" and order the DOD to use its resources in support of state and local efforts.[22] Major disasters are those catastrophes (including fires) which the President determines have caused damage of "sufficient severity and magnitude to warrant major disaster assistance."[23] The President makes his determination based on a request from the Governor of the affected state.[24] To support his or her request, the Governor must take action under state law and direct execution of the state emergency plan.[25] The Governor also must furnish information on the nature and amount of state and local resources committed and must certify that the state will comply with applicable cost-sharing requirements.[26]

Second, the President may declare an "emergency" and order the DOD to support state and local assistance efforts.[27] Emergencies are those occasions where the President determines "Federal assistance is needed to supplement State and

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[11] Jones, *supra* note 1. *See also Shift in Weather Aids Battle Against California Fires*, MIAMI HERALD, Sept. 6, 1987, at 14A; *1,000 GIs Prepare to Fight Wildfires*, CHICAGO TRIB., Sept. 6, 1987, at 17.

[12] *See generally* Joint Task Force, Yellowstone, After Action Report [hereinafter Yellowstone After Action Report]. *See also Soldiers to Assist Firefighters*, PHIL. INQUIRER, Aug. 22, 1988, at A4; *Fires Rage on out West*, NEWSDAY, Aug. 27, 1988 at 11; *Help for Yellowstone*, NEWSDAY, Aug. 23, 1988, at 14; David Foster, *Military, Civilian Novices Sent in to Reinforce Weary Regular Crews: Soldiers Enlist in War Against West's Raging Forest Fires*, L.A. TIMES, Sept. 11, 1988, § 1, at 2; *Snow Provides Some Relief From Yellowstone Fire*, DETROIT FREE PRESS, Sept. 12, 1988, at 14A; *Snow Dulls Yellowstone Fires*, NEWSDAY, Sept. 12, 1988, at 4 ("Deputy Defense Secretary William Taft IV said 1,200 Marines and two Army battalions will join the 2,300 Army soldiers from Fort Lewis, Wash., fighting the fires.").

[13] Rick DelVecchio, *Troops Joining Fight Against 2 Fiercest California Wildfires*, S.F. CHRON., Aug. 13, 1990, at A2.

[14] *California Fires Threaten Sequoias*, MIAMI HERALD, Aug. 14, 1990, at 10A.

[15] *Marines to Help Fight Wildfires in Northwest*, S.F. CHRON., July 30, 1994, at A5; *Marines Deployed to Fight Wildfires*, ATLANTA J., Aug. 1, 1994, at A/4; *Military is Called Upon to Battle Fires in West*, DETROIT FREE PRESS, Aug. 2, 1994, at 4A.

[16] America is not the only industrialized country to use its armed forces to fight fires. *See, e.g., French Try to Control Raging Forest Fires*, CHICAGO TRIB., Sept. 23, 1990, at 28 ("Smoke from raging forest fires blotted out the sun over the French Riviera Saturday as more than 2,000 firefighters and soldiers struggled to bring them under control."); *Chinese Forest Fire*, WASH. POST, May 18, 1987, § A, at A22 ("Vast forest fires raged across northeastern China for the 12th day. . . . The fire fighting force. . . includ[ed] 30,000 soldiers. . . . ").

[17] *See, e.g.*, Dunlap, *supra* note 4; *see also* Sam Walker, *A Few Good Men are Being Stretched too Thin*, CHRISTIAN SCIENCE MONITOR, Aug. 19, 1994, at 1.

[18] Mark Thompson, *Shali's Doctrine: A Do-Good Army*, TIME, Aug. 15, 1994, at 14.

[19] DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 13-5 (June 1993).

[20] 42 U.S.C.A. §§ 5121-5202 (1983 & West Supp. 1994).

[21] *Id.* §§ 5170a(1), 5192(a)(1) (1983 & West Supp. 1994).

[22] *Id.* § 5170a(1) (West Supp. 1994).

[23] *Id.* § 5122(2) (West Supp. 1994).

[24] *Id.* § 5170 (West Supp. 1994).

[25] *Id.*

[26] *Id.*

[27] *Id.* § 5192(a) (West Supp. 1994).

local efforts . . . to save lives and to protect property . . . or to lessen or avert the threat of a catastrophe. . . ."[28] The President also makes this determination based on a request from the Governor of the affected state.[29] The Governor must follow the same procedures for an emergency as those described above for a major disaster.[30] Additionally—and this appears to be the only difference between the two—the Governor must state the type and extent of federal aid required.[31] The Stafford Act generally limits federal assistance for "emergencies" to $5,000,000 per incident[32] and places no monetary limit on the amount of federal assistance for "major disasters."[33]

Third, during the immediate aftermath of an incident that ultimately may qualify as a "major disaster" or "emergency," the President may order the DOD to perform emergency work "essential for the preservation of life and property."[34] Although this authority does not require a presidential declaration, it mandates a request from the Governor of the affected state[35] and is a limited authority that may only last for ten days.[36]

Other Statutory Authority

The Stafford Act is the primary authority under which the DOD provides firefighting assistance to civilian authorities. Four other statutes, however, can be read to authorize MSCA for fire prevention.

The Fire Prevention and Control Act of 1974,[37] as amended, authorizes and directs federal agencies to provide support to the United States Fire Administrator on his written request.[38] The statute appears to limit support that is clerical or administrative in nature.[39]

The Federal Civil Defense Act of 1950,[40] as amended, authorizes the Federal Civil Defense Administrator to use the services of other federal agencies in support of the nation's civil defense.[41] This statute defines "civil defense" in part as "those activities and measures designed or undertaken . . . to minimize the effects of a hazard upon the civilian population. . . ."[42] A "hazard" includes an emergency or disaster resulting from, among other things, a natural disaster (such as a fire).[43] The intent of this statute appears to be protection from hazards that threaten the national security of the United States.

The Economy Act of 1932,[44] as amended, authorizes the loan of services and equipment between federal agencies on a reimbursable basis.

The Reciprocal Fire Protection Agreements Act of 1955,[45] as amended, authorizes federal agency heads to enter into reciprocal agreements with firefighting organizations in the vicinity of agency property. These mutual aid agreements are common at DOD installations.[46]

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[28] *Id.* § 5122(1) (West Supp. 1994).

[29] *Id.* § 5191(a) (West Supp. 1994).

[30] *Id.*

[31] *Id.*

[32] *Id.* § 5193(b) (West Supp. 1994). This limitation is subject to certain exceptions in the case of continuing emergencies.

[33] *See generally id.* §§ 5170a, 5170b (West Supp. 1994).

[34] *Id.* § 5170b(c)(1) (West Supp. 1994).

[35] *Id.*

[36] *Id.*

[37] 15 U.S.C.A. §§ 2201-2223 (West 1982 & Supp. 1994).

[38] *Id.* § 2218 (West 1982 & Supp. 1994).

[39] *Id.*

[40] 50 U.S.C.A. App. §§ 2251-2303 (West 1991 & Supp. 1994).

[41] *Id.* App. § 2253(c) (West 1991).

[42] *Id.* App. § 2252(d) (West Supp. 1994).

[43] *Id.* App. §§ 2252(a), 2252(c) (West Supp. 1994).

[44] 31 U.S.C.A. § 1535 (West Supp. 1994).

[45] 42 U.S.C.A. §§ 1856-1856o (West 1994).

[46] An example is the letter of agreement which the Commanding General, MCAS El Toro, California, signed on 24 August 1991. In that letter, the General agreed to permit the local community (Orange County) to use his firefighting assets to assist the local firefighters in the event they were needed. The county likewise agreed to provide support to the air station.

A detailed discussion of these statutes is beyond the scope of this article. The judge advocate should, however, review them prior to advising a command in this area of the law.

Regulatory Framework

The Federal Emergency Management Agency (FEMA)

On 20 July, 1979, President Jimmy Carter signed Executive Order (EO) 12,148,[47] entitled, Federal Emergency Management. This order transferred or reassigned existing federal emergency functions to the newly-created FEMA.[48] Among those functions were disaster assistance under the Stafford Act[49] and civil defense under the Federal Civil Defense Act.[50] In his order, President Carter directed the FEMA to "establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies."[51] He then delegated to the FEMA the functions, among others, vested in him under the Stafford Act.[52] He retained the authority to declare emergencies and major disasters.[53]

Pursuant to this mandate, the FEMA has given its associate director and regional directors authority to direct other federal agencies to use their resources to aid in disaster relief.[54] The authority which the FEMA delegated mirrors that found in the applicable portions of the Stafford Act, discussed above.[55]

In April 1992, the FEMA completed the Federal Response Plan (Plan), which lists twelve Emergency Support Functions (ESFs) falling under its umbrella.[56] The Plan designates a primary, or lead, federal agency for each ESF and provides supporting roles for other agencies.[57] For ESF 4, Firefighting, the FEMA has designated the United States Department of Agriculture as the primary federal agency.[58] The DOD plays a supporting, albeit important, role. When a major disaster or emergency strikes at the federal level, the FEMA designates a Federal Coordinating Officer (FCO) who coordinates all federal disaster assistance with and among state and federal agencies.[59]

The Department of Defense

Department of Defense policy states that the services will provide MSCA only when response or recovery requirements are beyond the capabilities of civil authorities.[60] Further, "military operations other than MSCA will have priority over MSCA, unless otherwise directed by the Secretary of Defense."[61] Notwithstanding those caveats, and as discussed above, the military services have played an ever-increasing role in fighting America's forest fires.

The DOD has designated the Secretary of the Army (SECARMY) as the DOD Executive Agent for MSCA.[62] Additionally, the DOD has directed the SECARMY to establish a single headquarters element—the Directorate of Military Support (DOMS)—through which the SECARMY issues orders necessary to perform his MSCA duties.[63] Accordingly, the DOMS is the focal point for all MSCA operations.

The MSCA Under the Stafford Act, the FEMA, and the DOMS

When the FEMA determines that a disaster demands military assistance, the FCO requests assistance through the

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[47] 44 Fed. Reg. 43239 (1979).

[48] *Id.*

[49] 42 U.S.C.A. §§ 5121-5202 (West 1983 & Supp. 1994).

[50] 50 U.S.C.A. App. §§ 2251-2303 (West 1991 & Supp. 1994).

[51] 44 Fed. Reg. 43239 (1979).

[52] *Id.*

[53] *Id.*

[54] 44 C.F.R. § 206.5 (1993).

[54] *Id.*

[56] *See generally* DOD MANUAL 3025.1M, *supra* note 8, at 1-13, fig. 1-1.

[57] *Id.*

[58] *Id.*

[59] 44 C.F.R. § 206.2(11) (1993).

[60] DEP'T OF DEFENSE, DIRECTIVE 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES 4 (15 Jan. 1993) [hereinafter DOD DIR. 3025.1]. *See also* DEP'T OF ARMY, I 500-60, DISASTER RELIEF, para. 2-1 (21 Aug. 1981) [hereinafter AR 500-60].

[61] DOD DIR. 3025.1, *supra* note 60, at 4.

[62] *Id.* at 10.

[63] *Id.*

DOMS.[64] The DOMS then coordinates with the Chairman of the Joint Chiefs of Staff and designates a supported Commander in Chief (CINC) as the operating agent.[65] For disasters in the continental United States (CONUS)—as forest fires are likely to be—the operating agent would be the CINC, United States Atlantic Command (CINCUSACOM).[66] The CINCUSACOM has designated the Commander, Forces Command (COMFORSCOM), as the Lead Operational Agency (LOA) for planning and execution of these disaster relief operations.[67]

When tasked to provide support, the COMFORSCOM will appoint a Defense Coordination Officer (DCO)—an officer in the grade of O-6—and, depending on the severity of the fire, may deploy a joint task force.[68] The 6th Army did this in 1988 to coordinate the firefighting efforts at Yellowstone National Park, Wyoming.[69]

The DCO serves as the DOD interface with the FEMA throughout the disaster.[70] Where a flag officer commands a joint task force, that commander may choose to work directly with the FCO, who may view the commander as the DOD representative.[71] Nonetheless, the DCO and his staff will continue to coordinate mission requests and validations, while the joint task force commander provides personnel, equipment, and supplies to the fire area.[72]

Following completion of the military mission, successful disengagement is absolutely critical.[73] Successful disengagement of support to civilian authorities requires that the key players visualize and agree on a set of conditions that defines the "end state."[74] These key players—the FCO, DCO, and state and local authorities—should define the end state early in the response phase and continually reassess it.[75] Once the joint task force reaches that end state, it should disengage.

Other Regulatory Authority for MSCA (Firefighting)

Regulations promulgated pursuant to the Stafford Act are not the sole source of authority for MSCA. Two others are worth noting.

National Interagency Fire Center (NIFC)

The military services may render support through coordination of the NIFC in Boise, Idaho.[76] "NIFC is a joint operation of the Departments of Agriculture and Interior. [It] is the primary Federal Agency responsible for coordinating the federal response to wild fires."[77] Under a 1975 Memorandum of Understanding (MOU) between the DOD and the Departments of Agriculture and Interior, the DOD has agreed to provide personnel, equipment, supplies, and services to help fight forest and wild fires that are beyond the capabilities of NIFC assets.[78] A similar 1990 MOU governs the use of DOD helicopter assets in fighting fires.[79]

The 1975 MOU recognizes two occasions during which the military will provide assistance fighting fires.[80] The first, discussed in detail above, is pursuant to the Stafford Act. The second is pursuant to a direct request from the NIFC. When

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[64] DOD MANUAL 3025.1M, *supra* note 8, at 2-5.

[65] *Id.*

[66] *Id.*

[67] *Id. See generally* USACOM Instruction 3440.1, USACOM Policy Directive for Military Support to Civil Authorities and Military Assistance for Civil Disturbance (MSCA/MACDIS) (1 Nov. 1993) ("COMFORSCOM is designated the LOA for providing MSCA . . . within the 48 contiguous states. . . .).

[68] DOD MANUAL 3025.1M, *supra* note 8, at 2-6.

[69] Yellowstone After Action Report, *supra* note 12.

[70] DOD MANUAL 3025.1M, *supra* note 8, at 2-6.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 2-8.

[74] *Id.*

[75] *Id.*

[76] Formerly the Boise Interagency Fire Center (BIFC). *See generally id.* at 3-10 to 3-13 (describing the procedure to coordinate and assign responsibility for responding to NIFC requests).

[77] *Id.* at 3-11.

[78] Memorandum of Understanding Between the Department of Defense and the Department of Agriculture and the Interior (25 Apr. 1975) [hereinafter 1975 MOU]; AR 500-60, *supra* note 60, app. B.

[79] Memorandum of Understanding Between Department of the Army/DOD Executive Agent and Boise Interagency Fire Center (8 Aug. 1990).

[80] 1975 MOU, *supra* note 78.

the NIFC determines that military assistance is "required and justified in order to suppress wildfire" and submits a proper request through military channels, the law requires nothing further for military support.[81] The MOU permits the NIFC to submit the request for assistance directly to "the appropriate CONUS Army" or, in emergency situations, to the nearest military installation.[82] Current Army directives, however, require the NIFC to submit the request to the *DOMS*, who in turn will notify the supported CINC—in all likelihood the CINCUSACOM.[83] Once the DOMS receives the request, the process mirrors that discussed above in the MSCA under the DOMS.[84]

Department of Defense Immediate Response Authority

The Secretary of Defense has authorized military commanders to act without prior authorization to prevent human suffering, to save lives, or to mitigate great property damage.[85] "When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders . . . are authorized . . . to take necessary action to respond to requests of civil authorities."[86] Such immediate response is fact and situation specific; thus, there may be no declaration of emergency or major disaster, but the commander on the scene nonetheless has the authority to act.[87] In appropriate circumstances, this authority applies to fire fighting assistance.[88]

Conclusion

Recent history demonstrates that the Armed Services will continue to play a role in battling our nation's forest and wild fires. Under the Stafford Act and its implementing regulations, the military may provide such assistance when the President declares an emergency or a major disaster, or during the immediate aftermath of a disaster that ultimately will qualify for this treatment. Further, pursuant to MOUs between the DOD and the NIFC, the military may provide assistance whenever the NIFC determines it to be necessary. Lastly, on scene commanders may provide assistance pursuant to the Immediate Response authority contained in DOD Directive 3025.1. Staff judge advocates would be wise to have these authorities on hand when the fire season approaches.

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[81] *Id.*

[82] *Id.*

[83] DOD MANUAL 3025.1M, *supra* note 8, at 3-11.

[84] *Id. See generally* FM 100-19, *supra* note 3, at 6-7, fig. 6-6.

[85] DOD DIR. 3025.1, *supra* note 60, para D.5.

[86] *Id.*

[87] DOD MANUAL 3025.1M, *supra* note 8, at 2-2.

[88] *Id.*

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issues (volume 2, number 5) is reproduced below:

Resource Conservation and Recovery Act (RCRA)

Satellite Accumulation Points (SAPs)

Under 40 C.F.R. § 262.34, a generator of hazardous waste may accumulate, without a permit, up to fifty-five gallons of hazardous waste in a SAP at or near the point of generation. According to Environmental Protection Agency (EPA) headquarters, the fifty-five-gallon limit applies to the total amount of hazardous waste in a SAP. For example, if a SAP has three fifty-five-gallon drums, each with twenty gallons of hazardous waste from different waste streams, the SAP exceeds the limit by five gallons.

The difficult issues concern the meaning of "at or near the point of generation": How close must the SAP be to the point of generation, and what is the point of generation? Unfortunately, EPA headquarters provides little guidance on these issues. The EPA says that these issues are "site-specific," meaning that each region may use a different approach. For instance, some regions say that if a SAP is on the other side of a door or exceeds an arbitrary distance (such as ninety feet) then it is not near the point of generation. Is a large motorpool with several different bay areas a single point of generation? If it is a single point of generation, it may only have one SAP. In addressing these issues, note that the rule requires that the operator of the process generating the waste must control the SAP. Thus, if a large motorpool has several distinct activities, each activity may have its own separate SAP, so long as each activity individually controls its SAP. However, some regions may not agree with this interpretation.

Finally, the rule contains other requirements. The generators must mark their containers with the words "Hazardous Waste" or other words identifying the containers' contents. The generator must satisfy 40 C.F.R. §§ 265.171, 265.172, and 265.173(a) and must seal all containers. Once the SAP exceeds fifty-five gallons, the generator must mark the container holding the excess amount with the date it exceeded the limit and, within three days, move the excess amount in accordance with 40 C.F.R. § 262.34(a). Major Luster and Major Bell.

Clean Air Act (CAA)

Limiting Potential to Emit

On 25 January 1995, the EPA issued important new guidance that may benefit installations with *potential* air pollutant emissions over, but *actual* emissions below, the major source thresholds for CAA programs, such as the Title V Operating Permit and the Title III Hazardous Air Pollutants (HAPs) programs. This memorandum, from the EPA Office of Air Quality, entitled, "Options for Limiting the Potential to Emit of a Stationary Source Under Section 112 and Title V of the Clean Air Act," is available on the EPA's Technology Transfer Network, an electronic bulletin board that can be accessed by dialing (919) 541-5742. The guidance explains the means by which states can allow sources to escape Title V and Title III requirements by creating federally enforceable limits on potential emissions below the major source thresholds ("synthetic minor" status). The means available to states include EPA approved: non-Title V state operating permit programs; prohibitory rules in State Implementation Plans (SIPs); general permit programs for very small sources; construction permit programs, such as New Source Review; and the Title V operating permit program (limits on potential emissions in the Title V permit can eliminate some Title V requirements and can be used to avoid Title III requirements applicable to major sources altogether).

Because many states currently do not have federally enforceable programs in place allowing for the creation of synthetic minor status, the EPA will allow a two-year transitional period for qualifying sources. States are not required to provide for this transitional period. To qualify, sources must consistently have actual emissions "at levels that do not exceed 50 percent of any and all of the major stationary source thresholds applicable to the source." During the transitional period, sources will not have to meet major source requirements (*e.g.*, apply for a Title V permit, even though they are not subject to any federally enforceable limit on potential emissions). However, sources must maintain records demonstrating qualifying emissions levels.

Environmental law specialists should assist their environmental staff in assessing the advantages and disadvantages of establishing federally enforceable limits on their installation's potential to emit. By opting for synthetic minor status now, installations can avoid the onerous Title V and emerging Title III requirements (EPA will issue 174 National Emission Standards for Hazardous Air Pollutants (NESHAP) over the next five years). Many of these NESHAP will directly affect Army installations that constitute a major source.

Installations must carefully weigh the benefits to be derived from synthetic minor status against the mission limitations inherent in any federally enforceable limits on potential emissions. Specifically, installations should ensure that any federally enforceable limits will not interfere with the performance of anticipated missions in times of national emergency.

Gasoline Distribution NESHAP

On 14 December 1994, the EPA promulgated NESHAP for new and existing gasoline distribution facilities.[1] The rule establishes Maximum Achievable Control Technology (MACT) for gasoline bulk terminals and pipeline breakout stations that transfer and store gasoline and other petroleum products. The Army's Center for Health Promotion and Preventive Medicine (CHPPM) advises that installations that receive gasoline from pipeline, ship, or barge and can dispense more than 13.9 gallons per minute may be affected by the rule. Environmental law specialists should work with installation technical personnel to assess the applicability and impact of this rule. The point of contact at CHPPM is Dr. Dave Reed, DSN 584-8153; (410) 671-8153. Major Teller.

Comprehensive Environmental Response, Compensation, and Liability (CERCLA)

CERCLA Oversight Costs

Another court has addressed the issue of the allowability of oversight costs as a CERCLA response cost. The latest decision, *Colorado v. U.S. and Shell Oil Company*,[2] involved the Army and the Rocky Mountain Arsenal cleanup. The district

[1] 59 Fed. Reg. 64,303 (1994).

[2] 867 F. Supp. 948 (D. Colo. 1994).

court held that recovery of response costs is available under the CERCLA even though the costs were incurred pursuant to Colorado's hazardous waste laws implementing the RCRA, and not pursuant to the CERCLA. The court's ruling allows recovery if the costs are incurred by a state in connection with a removal or remedial action not inconsistent with the National Contingency Plan for the removal or remediation of hazardous substances. The case seems to conflict with *U.S. v. Rohm & Haas*,[3] which denied recovery of CERCLA oversight costs. Mr. Nixon.

Clean Water Act (CWA)

Enforcement

In *United States v. Weitzenhoff*,[4] appellants appealed their conviction for violations of the CWA contending, in part, that the district court misconstrued the word "knowingly" in section 1319(c)(2) of the act. The district court had instructed the jury that a knowing violation of the CWA required only that defendants were aware that they were discharging the pollutants in question, not that they knew they were violating the terms of the statute or a permit. The appellate court affirmed, noting that the criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution and as such, fall within the category of public welfare legislation. Therefore, the government did not need to prove that appellants knew their acts violated either a permit or the CWA. Environmental law specialists should ensure that the appropriate individuals at their installation are aware of this holding. In this case, at least, ignorance was not bliss. Major Saye.

Litigation Branch Update

Recent National Environmental Policy Act (NEPA) Cases

The Litigation Branch has an active NEPA litigation practice. A recent favorable decision in a NEPA case contains a good discussion of environmental standing law. *Downwinders v. Cheney* [5] involved a NEPA challenge to laboratory testing at Dugway Proving Ground under the Army's Biological Defense Research Program (BDRP). The plaintiff, Downwinders, is an environmental organization whose interests focus on the use of biological, chemical, and nuclear weapons in Utah. Downwinders alleged a number of different kinds of potential injury in this case, to include potential exposure of its members who live, work, or recreate in the vicinity of Dugway to a release of harmful biological agents. The district court granted the government's motion for summary judgment, finding that the plaintiffs lacked standing. The court held that the plaintiffs' allegations of potential medical risks from biological testing were too speculative and hypothetical to constitute the "injury in fact" prong of the standing requirements.

We also recently successfully defended two motions for preliminary injunction in NEPA cases. In the first, the plaintiffs, a local citizens group, sought to enjoin the National Guard from contracting for and constructing an $8 million multipurpose range complex at Camp Grayling, Michigan. Addressing the prongs for injunctive relief, the court found that plaintiffs' allegations of irreparable harm were, first, a generalized taxpayer grievance, insufficient for standing, and second, speculative. In looking at the balance of harms, the court found that the government would suffer the greater harm because the $8 million appropriated for the project would lapse within a few days, and plaintiffs could not demonstrate that funds would be appropriated in the future to replace the lapsed money. The court further found that granting the injunction could greatly harm the public, which has a right to expect a highly trained militia. Finally, the court determined that it was unnecessary to render a finding on the plaintiffs' likelihood of prevailing on the merits because plaintiffs had not satisfied the other prongs.

The second successful defense of a preliminary injunction motion involved local landowners' NEPA challenges to testing elements of the Army Tactical Missile System (ATACMS) and the Theater High Altitude Area Defense System (THAAD) at White Sands Missile Range, New Mexico. In this case, the court was not persuaded that the plaintiffs' allegations of disruption of their ranching operations, risks to their personal safety, and potential environmental injury constituted sufficient irreparable injury. In looking at the public interest and the balance of harms, the court found that the significant costs to the government associated with delays in testing—up to $22 million per month—would not be in the public's interest. Major Miller.

Clean Air Act—Title V Operating Permit Program Update on State Application Deadlines

The following is an updated, interim listing of state deadlines for submitting an application for a Title V Operating Permit. Many deadlines have not been approved by the EPA and are subject to change. Installations that need a Title V operating permit should independently confirm their state's application deadline. In checking deadlines, we encourage environmental law specialists to call the ELD with any corrections or additions to list below.

Many deadlines depend on the date of EPA approval (either full or interim) of the state's Title V program, which will vary widely and cannot be accurately determined at this point.

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[3] 2 F.3d 1265 (3d Cir. 1993).

[4] 35 F.3d 1275 (9th Cir. 1993), *cert. denied*, No. 94-668363 U.S.L.W. 3563 (U.S. Jan 23, 1995).

[5] No. 91-C-681J (D. Utah Dec. 30, 1994).

While the Clean Air Act imposed a 15 November 1994 deadline for EPA approval of state programs, the states and the EPA did not meet this deadline in most cases. As of 4 January 1995, the EPA had received submittals from forty-five states and fifty-eight local programs. Approvals have been published in the *Federal Register* for five state and eight local programs. One state program, Virginia's, was disapproved. Additionally, the EPA has proposed in the *Federal Register* approval of seven state programs and twenty-two local programs and disapproval of four local programs. Installations in states with application deadlines dependent on the date of EPA approval should closely monitor the status of their state's program.

As a reminder, for an installation to continue to operate lawfully after the application deadline and before issuance of a Title V permit, it must submit a "timely and complete" application. Submission of a timely and complete application creates an "application shield" that allows the installation to continue to operate pending issuance of the Title V permit, which could take several years. An application is deemed "complete" unless the state notifies the installation that the application is "incomplete" within sixty days after the application is submitted. If the state notifies an installation that its application is "incomplete" after the deadline has passed, the application will not be "timely" and the installation will not have the benefit of an application shield. Consequently, installations should file their Title V applications at least ninety days before the state's filing deadline. This will allow an installation sufficient time to correct an "incomplete" application and make a "timely" submission prior to the application deadline. Major Teller.

Alabama

One-third of sources (randomly selected)—15 June 1995; remaining sources twelve months after EPA approval. Fort Rucker is in the first group. The deadline for synthetic minor applications is 31 May 1995.

Alaska

Twelve months after EPA approval.

Arizona

1 May 1995.

Arkansas

State will begin notifying sources of the applicable deadline in the spring or early summer of 1995. Deadlines will be staggered, starting in October 1995.

California

Twelve months after EPA approval.

Colorado

Twelve months after EPA approval (some nonmilitary sources are required to file earlier). The EPA granted interim approval effective 23 February 1995.[6]

Connecticut

Twelve months after EPA approval.

District of Columbia

Twelve months after EPA approval. The District of Columbia will send notification letters recommending that smaller sources (less than 150 tons per year) apply within eight months after EPA approval.

Florida

Three deadlines based on type of facility: 2 April 1994—power plants and facilities subject to the New Source Review (NSR) or Prevention of Significant Deterioration (PSD) programs; 2 July 1995—facilities subject to NESHAPs and the New Source Performance Standards (NSPS) programs; 15 July 1995—all other facilities.

Georgia

The state will issue calls as follows: for one-third of sources in nonattainment areas, two months after EPA approval; for remainder of sources in nonattainment areas and sources in attainment areas, six months after EPA approval; for any sources not previously called, ten months after EPA approval. Synthetic minor source applications were due by 2 February 1995.

Hawaii

26 November 1994 (some nonmilitary sources required to submit earlier). The EPA approved the program on 1 December 1994.[7]

Idaho

Three deadlines: 1 December 1994, 1 March 1995, or 1 June 1995. State will assign deadline for each facility, attempting to accommodate each facility's choice.

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[6] 60 Fed. Reg. 4563 (1995).

[7] 59 Fed. Reg. 61,549 (1994).

Illinois

Three to twelve months after EPA approval according to SIC code;[8] for SIC code 97—three months (facilities may be able to use alternative SIC codes with a later deadline). Environmental Protection Agency approval expected in February 1995.

Indiana

Twelve months after notice (for one-third of sources, notification was to begin in September/October 1994) or twelve months after EPA approval.

Iowa

Three-part application process. Part One (inventory and fee) were due 15 November 1994; Part Two (compliance plan and schedules) due 15 May 1995; and Part Three (certification) must be submitted with both parts one and two. Voluntary application for synthetic minors—1 March 1995.

Kansas

Staggered from six to twelve months after EPA approval.

Kentucky

Twelve months after EPA approval.

Louisiana

Twelve months after EPA approval.

Maryland

For SIC code 97—12 months after EPA approval.

Massachusetts

Three groups by SIC code; SIC code 97—due between 1 July 95 and 1 September 1995.

Michigan

For SIC code 97—15 October 1996.

Minnesota

Staggered deadlines by SIC code. Deadline for SIC code 97 is 15 February 1996.

Mississippi

Twelve months after EPA approval (for some SIC codes—six months, but not SIC code 97). The EPA granted full approval of program effective 27 January 1995.[9]

Missouri

First group—sixty days after EPA approval; second group twelve months after EPA approval. First group is made up primarily of volunteers.

Montana

One-third of sources already notified to submit thirty days after EPA approval; remaining sources—twelve months after EPA approval.

Nebraska

Twelve months after EPA approval.

Nevada

Twelve months after EPA approval. The EPA granted interim approval of the program for Washoe County effective 6 March 1995.[10]

New Jersey

SIC code 97—15 Aug 1995. State recommends filing by 15 May 1995.

New Mexico

Sources with 1987 or later state operating permit—forty-five days after EPA approval; with pre-1987 operating permit—six months after EPA approval; no state operating permit—twelve months after EPA approval. The EPA granted interim approval of state program effective 19 December 1994.[11]

New York

Brief application due twelve months after EPA approval; for SIC code 97 final application due forty-eight months after EPA approval (uncertain whether EPA will approve this application schedule).

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[8] The EPA and states generally classify military installations as Standard Industrial Classification (SIC) Code 97-National Security. *See* STANDARD INDUSTRIAL CLASSIFICATION (SIC) CODE MANUAL (1987). In appropriate cases, installations may wish to seek state approval for use of alternative SIC codes, which may change the application deadline in some states. Watch the *Bulletin* for further information of the use of SIC codes other than "97."

[9] 59 Fed. Reg. 66,737 (1994).

[10] 60 Fed. Reg. 1741 (1995).

[11] 59 Fed. Reg. 59,656 (1994).

North Carolina

For SIC code 97—sixty days after EPA approval.

North Dakota

Two application deadlines: 15 February 1995—oil and gas industry major sources; 15 November 1995—all other major sources.

Ohio

Staggered from sixty days to 365 days after EPA approval.

Oklahoma

Twelve months after EPA approval.

Oregon

Twelve months after EPA approval. The EPA granted interim approval of the program effective 3 January 1995.[12]

Pennsylvania

The state is administering its program through its six regional offices. Each region will independently issue calls to source groups. The first calls were expected to be issued in March 1995. Applications will be due within 120 days of call by the region or within one year after the state's permit regulations were finally published (26 Nov 1994).

South Carolina

Sources randomly assigned a deadline from 15 February 1995 through 15 November 1995 (Fort Jackson—15 July 1995).

South Dakota

State expects to begin mailing applications to sources in March 1995. Sources will have three months from notification to file application.

Tennessee

Volunteers—120 days after EPA approval (incentives offered); all others—twelve months after EPA approval.

Texas

SIC code 97—three years after EPA approval of interim program.

Utah

Three months after EPA approval.

Vermont

One year from the effective date of the state's operating permit program, which is expected to be in March 1995.

Virginia

Twelve months after EPA approval. The EPA disapproved program on 5 December 1994.[13] Virginia resubmitted on 10 January 1995.

Washington

180 days after EPA approval. The EPA granted interim approval of the state and various regional programs effective 9 December 1994.[14]

Wisconsin

Staggered from 1 May 1994 to 1 October 1995 (Fort McCoy—1 May 1995; Badger AAP—1 June 1994).

Wyoming

Twelve months after EPA approval. The EPA granted interim approval effective 21 February 1995.[15]

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[12] *Id.* at 61,820.

[13] *Id.* at 62,324.

[14] *Id.* at 55,813.

[15] 60 Fed. Reg. 3766 (1995).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Admissibility of Article 15s at Courts-Martial

The Army Court of Military Appeal's (ACMR) decision in *United States v. Weatherspoon*[1] that an Article 15 from a soldier's security clearance file was inadmissible at trial further restricts the evidence that trial counsel may introduce during presentencing proceedings.[2] By holding that the "personnel records" mentioned in Rule for Courts-Martial (R.C.M.) 1001[3] refer only to the official Military Personnel File (OMPF), Military Personnel Records Jacket (MPRJ), and Career Management Individual File (CMIF), the ACMR has drastically reduced the sources for derogatory information available for the case in aggravation.

In *Weatherspoon*, an enlisted panel convicted the accused of several specifications involving the use and distribution of marijuana.[4] During the presentencing phase, trial counsel offered into evidence an Article 15 for previous marijuana use. The Article 15 was four years old. The authenticating certificate indicated that it came from files in the "Investigative Records Repository, U.S. Army Central Security Facility."[5] The defense counsel objected on the grounds that the document was untimely and was received during a prior enlistment.[6] The military judge overruled the objection, noted that the document was properly executed, and admitted the Article 15.[7]

On appeal, the appellant argued that the Article 15 should have been removed from his personnel records after two years had elapsed from the date punishment was imposed in accordance with *AR 27-10*.[8] Paragraph 3-37(b) provides that for soldiers in the grade of E4 and below, original records of nonjudicial punishment will be retained in unit nonjudicial punishment files for two years and then destroyed.[9] The government argued that the Article 15 was properly maintained in the Investigative Records Repository (IRR) according to *AR 381-45*, which does not require removal after any length of time.[10]

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[1] 39 M.J. 762 (A.C.M.R. 1994).

[2] *Id.* at 768. In the Army, nonjudicial punishment is recorded on DA Form 2627. The form consists of the original and five carbon copies. Each copy is numbered. Dep't of Army, DA Form 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984). After completion, the original and copies are forwarded for filing in accordance with *Army Regulation (AR) 27-10*, paragraph 3-37. Location of the filing depends on the soldier's grade and the commander's filing determination. *See* DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 3-37 (22 Dec. 1989) [hereinafter AR 27-10].

[3] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1001 (1984) [hereinafter MCM]. Rule for Court-Martial 1001(b) provides, in part, that matters may be presented by the prosecution as follows:

> (2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.
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> "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused.

[4] *Weatherspoon*, 39 M.J. at 764. A general court-martial found the accused guilty of three specifications of wrongful distribution of small amounts of marijuana and two specifications of wrongful use of marijuana. *Id.* The court sentenced him to a bad-conduct discharge, confinement for 60 months, total forfeitures, and reduction to Private E1. *Id.*

[5] *Id.* at 767. The Article 15 was dated 15 January 1988. Trial began on 11 September 1992. *Id.* at 765, 767. The authenticating certificate on the Article 15 also indicated that it was stored "as prescribed by Army Regulation 381-45." *Id.* at 767.

[6] *Id.* The defense argued that the Article 15 was "stale, untimely and from a prior enlistment where [the appellant] received an Honorable Discharge." *Id.* On appeal, the government argued that the defense waived the issue by not explicitly citing *AR 27-10*, and its rules on filing Article 15s. *See infra* notes 8, 9 and accompanying text.

[7] *Id.* At trial, the issue was not discussed in detail. The judge observed that the Article 15 was properly formatted, initialed, and executed. *Id.* The judge did not specifically respond to the defense's argument on timeliness.

[8] *Id.* (citing AR 27-10, *supra* note 2, paras. 3-37b(1), 3-44b)).

[9] AR 27-10, *supra* note 2, para. 3-37b(1). A new version of *AR 27-10* was promulgated several months after the date of the *Weatherspoon* opinion. The new version of *AR 27-10* does not change the provisions applicable to this case. *Compare* AR 27-10, *supra* note 2, paras. 3-37, 3-44 *with* DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, paras. 3-37, 3-44 (8 Aug. 1994).

[10] *Weatherspoon*, 39 M.J. at 768 (citing DEP'T OF ARMY, REG. 381-45, MILITARY INTELLIGENCE: INVESTIGATIVE RECORDS REPOSITORY (10 Aug. 1977) (C1, 15 Aug. 1979) [hereinafter AR 381-45]). The ACCA relied on a superseded regulation. A new version of *AR 381-45* was released in 1989. *See* DEP'T OF ARMY, REG. 381-45, MILITARY INTELLIGENCE: INVESTIGATIVE RECORDS REPOSITORY (25 Aug. 1989).

The ACMR began its analysis by examining R.C.M. 1001(b), which governs matters that the government may introduce during the presentencing proceedings.[11] Subsection (2) allows the trial counsel to introduce evidence of the character of the accused's prior service from the accused's "personnel records." These records must be maintained "in accordance with departmental regulations."[12] The ACMR then explored the regulation governing personnel records, *AR 640-10*.[13] The ACMR noted that *AR 640-10* discusses three types of personnel records: the OMPF, MPRJ, and CMIF.[14] These records are designed to formally record the history of a soldier's military service.[15] For some soldiers, records of nonjudicial punishment may be filed in the OMPF and MPRJ, but *AR 640-10* provides the same guidance as *AR 27-10* with regard to filing for soldiers in the grade of E4 and below.[16] Therefore, the Article 15 should have been removed from the unit nonjudicial punishment files after two years.

In addressing the government's argument that the Article 15 was properly filed in the IRR, the ACMR first concluded that *AR 381-45* prohibits the filing of Article 15s in the IRR.[17] The ACMR also noted that the IRR is not a "personnel record," rather it serves as a counter-intelligence investigative record.[18] The ACMR rejected the government's argument and ruled the Article 15 inadmissible, because the rules regarding Article 15 filing were violated and the source for the document was not a "personnel record" within the meaning of R.C.M. 1001(b)(2).[19]

The ACMR has strictly interpreted "personnel records" to include only the OMPF, MPRJ, and CMIF. In adopting this narrow interpretation of the term, the ACMR relied on the definition of "personnel records" in *AR 640-10*: "[a] collection of documents maintained as a single entity that pertains to the military career of a particular soldier."[20] Rule for Court-Martial 1001 provides a more expansive description of the term in that it does not require that the documents be maintained as a single file.[21] Why the ACMR chose to ignore the broader description in the R.C.M. and adopt the narrow definition in a personnel regulation is unclear, especially when the stated purpose of the regulation is to prescribe procedures for the military personnel system, not to determine admissibility of evidence at court-martial.[22]

Weatherspoon dealt with an Article 15 filed in the IRR, a record not even mentioned in *AR 27-10*. What about other files? Copies of nonjudicial punishment frequently go to a soldier's finance records, for example, when the punishment includes reduction in rank or forfeiture of pay.[23] *Army Regulation 27-10* specifically authorizes this distribution of an

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[11] MCM, *supra* note 3, R.C.M. 1001(b).

[12] *Id.* R.C.M. 1001(b)(2).

[13] *Weatherspoon*, 39 M.J. at 767-68 (citing DEP'T OF ARMY, REG. 640-10, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: INDIVIDUAL MILITARY PERSONNEL RECORDS (31 Aug. 1989) [hereinafter AR 640-10]). The ACMR again relied on a superseded regulation. *See* DEP'T OF ARMY, REG. 600-8-104, MILITARY PERSONNEL INFORMATION MANAGEMENT/RECORDS (27 Apr. 1992) [hereinafter AR 600-8-104] (combining *AR 640-10* and two other personnel regulations). For a discussion of the differences between these two regulations, *see infra* note 14.

[14] *Weatherspoon*, 39 M.J. at 767 (quoting AR 640-10, *supra* note 13, ch. 1). Interestingly, the new regulation lists a fourth type of personnel record, the Classified Personnel Record. *See* AR 600-8-104, *supra* note 13, para. 1-16. This record contains any documents that would otherwise go into the MPRJ, except for their classification. *Id.* para. 1-18. It does not authorize the filing of any documents besides those normally filed in the MPRJ. *Id.* With respect to the filing of Article 15s, the obsolete regulation and the new regulation are the same. *Compare* AR 640-10, *supra* note 13, tbl. 3-1 *with* AR 600-8-104, *supra* note 13, tbl. 6-1.

[15] *Weatherspoon*, 39 M.J. at 767 (quoting AR 640-10, *supra* note 13, para. 1-5).

[16] *See* AR 27-10, *supra* note 2, para. 3-37b(1); AR 640-10, *supra* note 13, tbl. 3-1.

[17] *Weatherspoon*, 39 M.J. at 768 (quoting AR 381-45, *supra* note 10, para. 2-6). The current version of *AR 381-45* also prohibits the filing of an Article 15, unless the Article 15 was forwarded by the United States Army Central Clearance Facility as part of a personnel security adjudicative file. DEP'T OF ARMY, REG. 381-45, MILITARY INTELLIGENCE: INVESTIGATIVE RECORDS REPOSITORY, para. 2-1c(6) (25 Aug. 1989). Apparently, there was no evidence that the Article 15 in *Weatherspoon* was taken from this type of file because the opinion contains no discussion about this issue. If trial counsel discovers an Article 15 in the IRR, counsel should be prepared to show its source and could lay the proper foundation with an authenticating certificate or through testimony by the records custodian.

[18] *Weatherspoon*, 39 M.J. at 768 (citing AR 381-45, *supra* note 10, para. 1-5). The IRR includes a personnel security clearance information file, however. DEP'T OF ARMY, REG. 381-45, MILITARY INTELLIGENCE: INVESTIGATIVE RECORDS REPOSITORY, para. 2-1a(6) (25 Aug. 1989). These files contain documents relating to those people within Department of the Army (military, civilian, and contractors) with a security clearance history. *Id.*

[19] *Weatherspoon*, 39 M.J. at 768. Based on the improper admission of the Article 15 at trial, the ACMR reassessed the sentence and reduced the term of confinement from 60 to 48 months. *Id.* After concluding that the reassessed sentence was still too severe, the ACMR further reduced the confinement to thirty-six months. *Id.* at 769.

[20] *Id.* at 767 n.6 (quoting AR 640-10, *supra* note 13, Glossary). *See also* AR 600-8-104, *supra* note 13, Glossary.

[21] *See supra* note 3. Rule for Court-Martial 1001(b)(2) requires compliance with service regulations as a prerequisite to admissibility.

[22] *Compare* MCM, *supra* note 3, R.C.M. 101(a) ("These rules govern the procedures and punishments in all courts-martial") *with* AR 600-8-104, *supra* note 13, para. 1-1 ("This regulation prescribes the policies and mandated operating tasks for the Military Personnel Information Management/Records Program of the Military Personnel System").

[23] In the past, trial counsel often have discovered that records of nonjudicial punishment were not always filed properly. The resourceful trial counsel might go to a different file, for example, a soldier's finance records—to retrieve a copy of an Article 15. If the wrong copy is filed—the Article 15 is still admissible as long as it is retrieved from a file authorized to contain Article 15s. AR 27-10, *supra* note 2, para. 3-44b.

Article 15.[24] Notwithstanding this authority, one logical reading of *Weatherspoon* is that the finance record is not a type of personnel record and, therefore, an Article 15 from such records is inadmissible under R.C.M. 1001(b)(2).

The opinion also raises an interesting question with regard to Article 15s filed "locally in unit nonjudicial punishment files."[25] These files, which contain records of nonjudicial punishment imposed on soldiers in the grade of E4 and below, are mentioned in *AR 27-10*.[26] The files generally are maintained by unit, usually company or battalion, and not by reference to a particular soldier's name. For this lower ranking soldier, the Article 15 will not be filed in the OMPF, MPRJ, or CMIF.[27] However, as a result of *Weatherspoon*, the unit files, the sole repository for Article 15s for some soldiers, cannot be used as a source for documents to be offered during the presentencing phase.

Although the wide-ranging results of *Weatherspoon* may not have been intended by the ACMR, counsel, especially defense counsel, can argue its narrow reading of documents admissible during the presentencing phase. Defense counsel will want to quote the court's language identifying the OMPF, MPRJ, and CMIF as the only sources for documents offered by the government to describe the prior service of the accused. Trial counsel, on the other hand, should attempt to distinguish Article 15s found in unit nonjudicial punishment files and finance records from Article 15s in the IRR. The former are authorized by *AR 27-10*, and as noted above, the regulation dictates distribution of certain copies of the Article 15 to those files.[28] Additionally, counsel should argue that if unit-filed Article 15s were not intended for use at court-martial proceedings, such a limitation would have been made explicit in *AR 27-10*, as it is for summarized records of nonjudicial punishment.[29]

In strictly reading the term "personnel records" in R.C.M. 1001(b), the ACMR may have made records of nonjudicial punishment filed in other records inadmissible even though these records are authorized by regulation. It is unlikely that such a result was intended by the drafters of *AR 27-10* and the outcome may deny the sentencing authority access to important information regarding a soldier's prior service. Major Wright.

New Course for Military Justice Managers

The Judge Advocate General's School (TJAGSA) is offering a new short course for military justice managers. The new course is primarily designed for new chiefs of military justice who have not attended the Army Judge Advocate Graduate Course. However, it is open to all active duty judge advocates currently serving or scheduled to serve in military justice management positions, including senior defense counsel, officers in charge of branch offices, and deputy staff judge advocates. Reserve and National Guard judge advocates may attend on a space available basis.

The course will provide information and practical tips on pretrial, trial, and posttrial procedures. Topics to be covered include case management, selection of court members, victim/witness liaison, and preparing pretrial advice and posttrial documents. The course also will discuss the new criminal law module of the Legal Automated Army-Wide System program.

The course will be held at TJAGSA, Charlottesville, Virginia, from 8 to 11 August 1995. Those interested in attending should contact their automation officer, who can apply for a reservation in the course through ATTRS (5F-F31). Major Masterton.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

The 36th Legal Assistance Course

The 36th Legal Assistance Course (Course) was held at TJAGSA from 27 February through 3 March 1995. The Course has continued to attract students from all services, but has been taught primarily by Army faculty from TJAGSA.

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[24] *Id.* para. 3-37d.

[25] *Id.* para. 3-37b(1).

[26] *Id.*

[27] Where the punishment includes unsuspended reduction in rank, forfeiture of pay, or a combination of the two, copies of the Article 15 will be forwarded to the military personnel office which maintains the MPRJ. AR 27-10, *supra* note 2, para. 3-37d(1). However, regardless of the punishment, the Article 15 is not authorized for filing in the MPRJ, nor is it filed in the OMPF. AR 600-8-104, *supra* note 13, tbl. 6-1.

[28] *See supra* notes 26, 28 and accompanying text.

[29] AR 27-10, *supra* note 2, para. 5-26a(4).

For the first time, however, officers from the Army, Air Force, Navy and Marine Corps participated as instructors. Air Force instructors included two members of the Air Force Judge Advocate General's School faculty, and future courses will include instructors from the Naval Justice School.

One popular feature of the Course is a seminar focused on addressing problems that students bring from the field. The following notes summarize several of the consumer and family law problems brought by students to the Course. Readers may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. Attorneys interested in attending the 37th Legal Assistance Course in October 1995 should consult the CLE News section for more information.

Consumer Law

Assumption of Automobile Loans

During the Course, a number of students discussed problems regarding automobile sales and their related loan agreements. Many service members purchase automobiles with the loan assistance of banks, or the financing arm of the manufacturers. Some lenders now include a provision that prevents the borrower from taking the automobile out of the jurisdiction without the lenders' permission. The lenders' reasons are, no doubt, tied to their desire to retain the ability to resort to judicial remedies should they have to repossess the automobile for failure to make payments.[30]

Understandably, lenders are concerned about their ability to enforce the provisions of their loan contract in a "foreign" jurisdiction. If the borrower plans to take the automobile to another state in the United States, the lender may not have as great a problem.[31] Transfers overseas, however, typically result in the lender refusing to permit the automobile's shipment.[32]

If the lender refuses to allow the service member to ship the vehicle overseas, the service member then faces the prospect of transferring overseas without the automobile. This option often presents an insurmountable personal financial obstacle. The service member has several options.

The automobile can be sold. If the sale must be done quickly, the automobile may have to be sold for far less than is owed the lender. In this case, the lender will not release the lien without the borrower making up the deficiency. If the service member does not have the money, the sale is ineffective because the member cannot transfer legal title. Additionally, many loan contracts contain a clause that accelerates the loan should the borrower sell the car. Thus, the sale itself causes the entire loan to be due and payable immediately. If the service member/borrower fails to pay off the loan, the lender may repossess the car and sell it to recover any losses.

The service member may attempt to have the automobile voluntarily repossessed. This is not an attractive option without aggressive planning and negotiating on behalf of the client. Without proper planning, the borrower may face all normal repossession and resale costs, as well as the prospect of a blemished credit report.[33]

A common, but nonetheless *highly questionable*, approach is to attempt to have some third party assume the responsibility for making payments on the car in return for a promise to turn over title when the loan is paid in full. This last approach is often facilitated through completion of a fill-in-the-blank "Bill of Sale." Many legal assistance offices provide a variety of blank legal forms for use by clients and[34] a commonly stocked form is the "Bill of Sale."[35] In at least a few cases, service personnel have visited a legal assistance office for a "Bill of Sale" and used it in an ineffective attempt to transfer full ownership of an automobile.

The problem with the "Bill of Sale" is that it routinely fails to transfer full title to the automobile, particularly when the legal title is held by a lending institution.[36] A standard form "Bill of Sale" typically recites only an exchange of offer and acceptance, a statement of the consideration involved, and a time for performance. The more clever legal assistance client may attempt to write in an assumption agreement, or even include other clauses that address the many issues created by

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[30] The Uniform Commercial Code allows a secured creditor to take possession of a secured item after default *without* resort to judicial remedy. While this provision is uniform in virtually all 50 states, it is not found overseas. *See* U.C.C. § 9-504 (1987).

[31] *Id.*

[32] Currently, Military Traffic Management Command informs service personnel that they need only provide proof that a *leasing* company allows the automobile to be shipped overseas. ARMED FORCES INFORMATION SERIES, SHIPPING YOUR POV 6 (1994).

[33] *See generally* NATIONAL CONSUMER LAW CENTER, Repossessions, § 6.1.1 (1988 & 1994 Supp.) (advises attorneys to negotiate repossession costs, deficiency and credit reporting issues before repossession).

[34] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-7e, (30 Sept. 1992). Legal assistance offices may provide document preparation for clients. *Id.* Legal assistance offices also may provide pro se services. *Id.* para. 3-7f(2).

[35] A "Bill of Sale" also can be purchased at many stationery stores or prepared at home on inexpensive home computer software.

[36] States typically include language on the reverse side of the Title Certificate that accomplishes transfer of the title as well as recording the fact of sale. *See, e.g.*, VA. CODE ANN. § 46.2-628 (Michie 1994) (seller shall correctly endorse certificate of title at transfer). Virginia even adds a criminal sanction for failure to transfer title at sale. *See id.* § 46.2-617 (sale of motor vehicle without transfer of title is a Class 3 misdemeanor).

loan assumptions. These include loan acceleration provisions, payment of recurring taxes, registration and inspection of the vehicle, providing insurance for the vehicle, and liability for acts of the driver operating the vehicle. Even if covered in the "Bill of Sale," provisions may be limited in effect by the loan contract, because lenders typically require the named borrower to comply with minimum insurance requirements, as well as inspection and registration laws. Consequently, even if the "Bill of Sale" addresses these issues, the original borrower still will be personally responsible for ensuring that the vehicle remains in compliance with all the terms of the lending agreement and applicable state law.

Legal assistance attorneys and their supporting staff should be extremely cautious when handing out blank legal forms. Service personnel may not have a full (or any) appreciation for the complexity of the legal arrangement that they are planning to enter into. Full, competent legal advice about the use of the form is a necessary part of the assistance rendered. Given the complexity of the legal issues involved, this advice should come from an attorney, *not* a paralegal, legal specialist, or legal clerk.[37] Major McGillin.

Family Law

Responding to Unwarranted Child Support Enforcement Efforts

Aggressive family support collection efforts by our states have greatly reduced the level of unpaid support by noncustodial parents. Occasionally, however, it can be difficult to stop unwarranted collection efforts once initiated. One case discussed at the Course involved a service member who fell into arrears on child support payments in the early 1980s. In response to an order from a Hawaiian court, his wages were garnished until the arrearage was satisfied in 1987. The service member continued to pay all outstanding support obligations. In 1993, without notice, the Internal Revenue Service (IRS) withheld the service member's 1993 tax refund at Hawaii's request. Hawaii had requested the tax intercept to recover the same arrearage satisfied by the pay garnishment completed in 1987. Efforts to discuss the case with support enforcement personnel failed and written correspondence generated only form letters in return. How can this matter be resolved before the member's 1994 tax refund is seized?

Tax intercept is an effective remedy for enforcing indebtedness on behalf of child support collection efforts. Problems with intercepts can be addressed with the originating agency, but may be more quickly resolved by contacting the IRS directly. In the present case, the client should contact an IRS employee at the IRS Collection Office. If that fails, the client should use the IRS "Problem Resolution Program."[38] The "Problem Resolution Office," found in all IRS district offices, can provide forms and assistance necessary to claim a refund, and to address future intercepts.

At the state level, many legal assistance attorneys have discovered that they can frequently open a dialog by communicating with a support enforcement attorney or prosecutor, as opposed to a caseworker or collections specialist. In the present case, documentation from the IRS refund application can be provided to substantiate the collection error that has occurred. Major Block.

Responding to Paternity Allegations

Army legal assistance attorneys generally understand that *AR 608-99* creates no legal obligation for a soldier to support a child born outside of marriage unless there is a court order identifying the soldier as the father of a child, and directing financial support of that child.[39] Several questions raised at the Course, however, reflect an appreciation that this should not be used as a basis for advice to ignore paternity allegations.

State child support enforcement officials frequently advance paternity allegations. Allegations often are raised informally at first, and later in formal pleadings if necessary. At an informal stage, soldiers can frequently negotiate a cost-sharing or no cost approach to blood testing, and, if paternity is not in dispute, may be able to reach agreement on favorable child support terms that take into consideration personal circumstances. Once pleadings are filed, soldiers may find a less receptive response to cost sharing and consideration of "personal problems." Coupled with the potential for award of support retroactive to birth,[40] the merit of not responding or refusing to cooperate is questionable. This may even be true when legitimate challenges to jurisdiction exist, given an opportunity to resolve a paternity allegation with finality.

Some soldiers will likely continue to ignore the chance to address paternity allegations at the earliest possible date, while others will affirmatively deny an obligation to support based on *AR 608-99*. The belief that *AR 608-99* will insulate a soldier from support obligations to illegitimate children in the long term is misplaced. Legal assistance attorneys should actively dispel this notion in their preventive law efforts. At

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[37] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 5.5(b) (1 May 1992). "A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." *Id.*

[38] *See IRS Publication 1, Your Right as a Taxpayer* and *Publication 594, Understanding the Collection Program.*

[39] DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, para. 2-2a (1 Nov. 1994).

[40] For example, see the Nebraska Supreme Court's discussion of the Nebraska Revised Statutes, § 43-1402, in Nebraska ex rel. Matchett v. Dunkle, 508 N.W.2d 580 (1993).

the same time, legal assistance attorneys can foster a relationship with state child support enforcement officials through mutual training arrangements and discussion.[41] We can learn a lot from these officials, and frequently will discover that they have many questions about the military. Assistance in responding to their questions and training materials focused on support enforcement against the military are available from the Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA. Major Block.

Professional Responsibility

Too Many Clients/Not Enough Time

Course students from all branches of service wanted to discuss problems created by too many clients. Attorneys reported seeing ten to twenty clients per day in some locations, while others described operations where appointments are limited to twenty minutes. Few students felt confident that their offices were adequately staffed to meet client demand.

Heavy client demand for legal services is a fact of life for most legal assistance operations. Particularly at large troop stations, demand for predeployment preparation is a full-time job in and of itself. Large numbers of appointments allow flexible client access and enhance responsiveness by generally limiting backlog. Legal assistance attorneys are the first to understand that it is not personally or professionally rewarding to turn away clients in need.

Despite the pressure created by client demand, many students were sensitive to the continuing obligation to provide competent client services. Balancing this professional obligation—which frequently requires large amounts of time—with large client numbers creates obvious pressures and management challenges. Ideas advanced to facilitate time for competence included: limiting intake appointments to mornings only, setting aside specific times or days for limited subjects (*e.g.*, will preparation), attorney subject matter specialization, improved client screening for nonlegal problems, expanded preventive law measures, lunch hour CLE programs, and use of Reserve Component attorneys and units where possible.

No matter how limited resources become, or how much demand increases, legal assistance attorneys must remember that these pressures create no exception to the requirement for competent and diligent representation found in our Rules of Professional Conduct.[42] Attorneys who feel that their ability to provide competent representation is being compromised have a professional duty to act, and this duty is shared by supervisory lawyers. Even if it creates difficult decisions that relate to limiting client eligibility or services, legal assistance attorneys are fooling themselves if they believe that their efforts to see too many clients or address too many problems will excuse their failure to competently represent *each* individual client. Major Block.

[41] For example, students from the state of Washington reported that they have invited child support enforcement officials onto the installation for lunch time training sessions.

[42] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 1.1 (1 May 1992).

Claims Report

United States Army Claims Service

Affirmative Claims Note

1994 Affirmative Claims Report

In fiscal year (FY) 1994, Army claims offices collected $11,231,252 in medical care recovery claims. Of that amount, $5,216,084 was returned to the military treatment facilities' operation and maintenance accounts. Additionally, $1,156,034 to cover the cost of damage to, or replacement of, government property was collected. Although this year's medical care recovery total dropped slightly from calendar year 1993, the number of claims asserted and recovered is higher than in 1992. The decline in both property damage and medical care recovery may be the result of continued favorable response to the Army's emphasis on safety. A downward trend in total accidents, injuries, and fatalities beginning with FY 1993 has been documented. Reduction in forces is another contributing factor to the decline in recoveries.

This marks the first affirmative claims report based on FY data. In the past, calendar year data was used.

To equitably reward claims offices, regardless of size, for their achievements in affirmative claims, the United States Army Claims Service (USARCS) uses a two-tiered recognition system. The top offices in total medical care recovery are

recognized as are the top offices in total property damage recovery. Additionally, the offices that demonstrate the most improvement in medical care recovery and the offices that demonstrate the most improvement in property damage recovery also are recognized. The claims data does not support awards for most improved in the property damage recovery category this year.

The United States Army Claims Service, Europe, is receiving special recognition as the top office in total affirmative claims recovery. Additionally, the United States Armed Forces Claims Service, Korea, is receiving special recognition in total property damage recovery.

The Judge Advocate General has issued Certificates of Excellence to those offices that have demonstrated superior achievement in the three awards categories with a letter of acknowledgment for each respective post commander. These offices are listed below in order of achievement. Ms. Jedlinski.

1. Total Medical Care Recovery:

a. United States Army Armor Center and Fort Knox;

b. 4th Infantry Division (Mechanized) and Fort Carson;

c. 1st Infantry Division (Mechanized) and Fort Riley;

d. III Corps and Fort Hood; and

e. Brooke Army Medical Center, Fort Sam Houston.

2. Total Property Damage Recovery:

a. Combined Arms Command and Fort Leavenworth;

b. 1st Infantry Division (Mechanized) and Fort Riley;

c. 24th Infantry Division (Mechanized) and Fort Stewart;

d. United States Army Field Artillery Center and Fort Sill; and

e. Army Training Center and Fort Jackson.

3. Medical Care Recovery, Most Improved:

a. United States Army Infantry Center and Fort Benning;

b. 101st Airborne Division (Air Assault) and Fort Campbell;

c. 4th Infantry Division (Mechanized) and Fort Carson;

d. United States Army Field Artillery Center and Fort Sill; and

e. United States Army, Japan (Camp Zama).

Personnel Claims Note

Repairs to a Fitness Machine

Recently, a claim file was forwarded to the USARCS for recovery. In responding to the demand (*i.e.*, DD Form 1843, Demand on Carrier), the carrier challenged the replacement cost paid by the field claims office for a Nordic Trac exercise machine. The field claims office paid full replacement cost minus appropriate depreciation where the damage to the machine consisted of an abraded pad on the waist/hip support extension and a bent support extension. The carrier pointed out that the Nordic Trac company sold replacement parts, such as the part described above, at a cost much less than the cost to replace the entire machine.

The facts of this claim raise an important point for all field claims offices when presented with a request by a claimant for replacement cost rather than repair cost for such an item. Do not overlook the possibility that the manufacturer can replace damaged parts. Contact their customer service departments to inquire about replacement parts. Most major companies have toll free numbers (usually found in owner's manuals or warranty books or by calling information) that you can use. The time spent in making such an inquiry can save the government money and still treat the claimant fairly. Captain Upton.

Policy Note

1995 Table of Adjusted Dollar Value

This table updates the *1994 Table of Adjusted Dollar Value* (ADV) previously printed in *The Army Lawyer*, April 1994, page 50, and *Department of the Army Pamphlet 27-162*, table 2-1 (15 December 1989). In accordance with *Army Regulation 27-20*, paragraph 11-13c (28 February 1990) and *DA Pamphlet 27-162*, paragraph 2-39e, claims personnel should use this table *only* when no better means of valuing property exists.

Year Purchased	*Multiplier 1994 Losses*	*Multiplier 1993 Losses*	*Multiplier 1992 Losses*	*Multiplier 1991 Losses*	*Multiplier 1990 Losses*
1994					
1993	1.03				
1992	1.06	1.03			
1991	1.09	1.06	1.03		
1990	1.13	1.11	1.07	1.04	
1989	1.20	1.17	1.13	1.10	1.05
1988	1.25	1.22	1.19	1.15	1.10
1987	1.30	1.27	1.24	1.20	1.15
1986	1.35	1.32	1.28	1.24	1.19
1985	1.38	1.34	1.30	1.27	1.21
1984	1.43	1.39	1.35	1.31	1.26
1983	1.49	1.45	1.41	1.37	1.31
1982	1.54	1.50	1.45	1.41	1.35
1981	1.63	1.59	1.54	1.50	1.44
1980	1.80	1.75	1.70	1.65	1.59
1979	2.04	1.99	1.93	1.88	1.80
1978	2.27	2.22	2.15	2.09	2.00
1977	2.45	2.38	2.32	2.25	2.16
1976	2.60	2.54	2.47	2.39	2.30
1975	2.75	2.69	2.61	2.53	2.43
1974	3.01	2.93	2.85	2.76	2.65
1973	3.34	3.26	3.16	3.07	2.94
1972	3.55	3.46	3.36	3.26	3.13
1971	3.66	3.57	3.46	3.36	3.23
1970	3.82	3.72	3.62	3.51	3.37
1969	4.04	3.94	3.82	3.71	3.56
1968	4.26	4.15	4.03	3.91	3.76
1967	4.44	4.33	4.20	4.08	3.91
1966	4.57	4.46	4.33	4.20	4.03
1965	4.70	4.59	4.45	4.32	4.15

Notes:

Do not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

To determine an item's value using the ADV table, find the column for the calendar year the loss occurred. Then multiply the purchase price of the item by the "multiplier" in that column for the year the item was purchased. *Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG).* For example, the adjudicated value for a comforter purchased in 1986 for $250, and destroyed in 1992, is $224. To determine this figure, multiply $250 times the 1986 "year purchased" multiplier of 1.28 in the "1992 losses" column for an "adjusted cost" of $320. Then depreciate the comforter as expensive linen (Item No. 88, ALDG) for six years at a five-percent (5%) yearly rate to arrive at the item's value of $224. (*i.e.*, $250 x 1.28 ADV = $320 @ 30% dep = $224).

The Labor Department calculates cost of living at the end of a year. For losses occurring in 1995, use the "1994" column. Ms. Holderness.

Tort Claims Note

Medical Legal Course

For several years, the USARCS Training Program included both the annual Claims Training Course and the annual Medical Legal Course. The Medical Legal Course was designed to focus on the investigation and adjudication of medical malpractice tort claims. After re-examining USARCS training objectives, and with a view toward more effectively training field claims personnel in the nuances of tort claims investigation and settlement, the Medical Legal Course will not be offered. In its place, the following initiatives will be implemented in 1995:

- •Expanded use of onsite training by USARCS Area Action Officers (AAOs) during more frequent visits to offices within the AAO's geographic responsibility;
- •Tort claims presentations as part of the annual Claims Video Teleconference program;
- •Instruction on Medical Malpractice issues at the United States Army Medical Command (MEDCOM) Medicolegal Workshop held every other year;
- •Expanded use of tort claims notes in the *Army Lawyer.*

Field claims attorneys and investigators are encouraged to submit tort topics of concern or interest to their responsible AAO, and every effort will be made to include these topics in discussions and presentations as indicated above. Lieutenant Colonel Moulin.

Claims Note

1995 Claims Video Teleconference Program

The USARCS has initiated a program of Video Teleconferences (VTC) designed to instruct and assist claims personnel in the field. Claims personnel are encouraged to participate to the maximum extent possible.

Schedule

Date	Time*	Focus of Instruction
5 Apr. 95	1530-1730	Torts
27 June 95	1230-1430	Personnel Claims & Recovery
11 Aug. 95	1300-1500	Torts
13 Oct. 95	1000-1200	Personnel Claims & Recovery
4 Dec. 95	1300-1500	Torts

*All times are Eastern times. If your VTC Center is in Central, Mountain, or Western time zone, please adjust for your location.

Live VTC Broadcasts

The following installations are scheduled to receive live broadcasts of the Claims VTCs. Occasionally, however, one or more installations will be unable to participate because of scheduling conflicts beyond the control of the USARCS.

Installation	Telephone Number for Audio Hookup (DSN)
TRADOC Installations	
1. Ft. Benning*	835-5534
2. Ft. Bliss	978-1029
3. Ft. Gordon	780-6562
4. Ft. Huachuca	879-6696
5. Ft. Jackson	734-5133
6. Ft. Knox	464-8666
7. Ft. Leavenworth*	552-4864
8. Ft. Leonard Wood	676-6163
9. Ft. McClellan	865-6552
10. Ft. Rucker	558-3010
11. Ft. Sill	639-4127
12. Ft. Eustis	927-4019
FORSCOM Installations	
13. Ft. Lewis	357-2471
14. Ft. Hood	737-3081
15. Ft. Bragg	236-3609
16. Ft. Riley*	856-6798
17. Ft. Carson	691-3589
18. Ft. Drum	341-6750
19. Ft. Stewart	870-4020
20. Ft. Campbell	635-9092
21. Ft. Irwin	470-5773
22. Ft. Polk	863-2377
23. Ft. McPherson	367-7181
24. Ft. Sam Houston	471-8216
25. Ft. Meade	923-5501

Claims personnel from Fort Meade, Fort Detrick, Aberdeen Proving Ground, Carlisle Barracks, Fort Ritchie, and the Military District of Washington are invited to attend the Claims VTCs live at the First Army VTC Center, room 123, First Army Headquarters building. For more information about attending the VTC at Fort Meade, please contact Ms. Audrey Slusher, the USARCS Administrative Officer, DSN 923-7009, ext. 205, or commercial (301) 677-7009, ext. 205.

Claims personnel from installations not receiving a live Claims VTC broadcast are invited to do one of the following:

1. Travel to the closest online VTC broadcast center to view a live broadcast. For example, claims personnel from Fort Lee and Fort Monroe are encouraged to attend the live VTCs at Fort Eustis.

2. Arrange for an "audio hookup." Each one of the VTC centers that will host a live broadcast has the capability of connecting one or more telephonic hookups to the live VTC broadcast. Coordinate with an online VTC Center several days in advance, then telephone the online VTC Center (at the numbers provided above) at least five to ten minutes before the start time of a broadcast to join through an audio hookup.

3. Request a videotape of any Claims VTC by sending a blank 120 minute standard VCR videotape to the USARCS, ATTN: Administrative Officer. Please ensure that you specify which VTC broadcast you are requesting. Lieutenant Colonel Millard.

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

1995 JAGC Senior Service College Selection Board

On 23 May 1995, the JAGC Senior Service College (SSC) Selection Board will convene to consider eligible judge advocates for selection to attend SSCs during academic year 1996-97. Officers meeting the following criteria are eligible for consideration:

1. Have completed a minimum of sixteen years (192 months) active federal commissioned service (AFCS) as of 1 October 1996, and will be serving in the grade of colonel or lieutenant colonel as of the board convene date;

2. Completed no more than twenty-three years (276 months) of AFCS as of 1 October 1996, excluding any period of AFCS while attending law school under the Funded Legal Education Program or the Excess Leave Program;

3. Have credit for completing a command and staff level college (military education level (MEL) 4);

4. Not have attended, received credit for attending, or declined attendance to a resident SSC or SSC fellowship;

5. Not enrolled in, graduated, or disenrolled from the Army War College Corresponding Studies Course Class 87-89 or later; and

6. Not have an approved separation date (either from resignation or retirement).

Officers who exceed the AFCS eligibility criteria may request a waiver by submitting, in writing, a request with adequate justification to PP&TO not later than 14 April 1995. The request does not require command endorsements. The approval authority is the Commanding General, PERSCOM.

The key items that the board considers include: the performance fiche of the Official Military Personnel File (OMPF); the Officer Record Brief (ORB); and the official Department of the Army (DA) photograph. These items should be current and complete. Please note that photographs[1] and physicals[2] older than five years are considered out of date.

Officers who have not reviewed their OMPF performance fiche recently should request a copy from PERSCOM. A written request containing the officer's full name, rank, social security number, and mailing address should be sent to:

Commander
U.S. Total Army Personnel Command
ATTN: TAPC-MSR-S
200 Stovall Street
Alexandria, Virginia 22332-0444

Alternatively, requests can be faxed directly to PERSCOM at commercial: (703) 325-0742; DSN: 225-0742.

Updated DA photographs (a color photograph is preferred), a signed ORB, and any documentation missing from the OMPF performance fiche should be mailed directly to:

Office of the Judge Advocate General
ATTN: DAJA-PT (MAJ Poling)
2200 Army Pentagon
Washington, DC 20310-2200

[1] DEP'T OF ARMY, REG. 640-30, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: PHOTOGRAPHS FOR MILITARY IDENTIFICATION FILES (1 Oct. 1991).

[2] DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989).

For the board to consider an academic evaluation report (AER) or officer evaluation report (OER), the original report must be received by the Evaluation Reports Branch (TAPC-MSE-R) at PERSCOM not later than 16 May 1995. Complete-the-record OERs must comply with *Army Regulation (AR) 623-105*,[3] and have a "Thru Date" of 16 March 1995.

Direct any questions about this board to Major Dan Poling (DAJA-PT), DSN: 225-8365.

Notification Requirements Concerning Civilian Attorneys

Civilian Personnel Offices (CPOs) are required to promptly notify PP&TO when any civilian attorney position is abolished, upgraded, or vacated.[4] Staff Judge Advocates (SJAs) should ensure that their local CPO complies with this requirement.

For personnel actions that involve hiring a civilian attorney, the CPO or SJA should forward a copy of the *SF-52-B* (Request for Personnel Action), job description, and a draft vacancy announcement, to PP&TO. This office dispatches the announcement. Applicants for competitive appointment submit all required information outlined in the vacancy announcement directly to the servicing CPO. The CPO rates each applicant against the minimum qualifications outlined in *AR 690-200*.[5]

The CPO convenes a panel to rank those applicants who meet minimum qualifications using the locally developed ranking criteria. The CPO and the legal office jointly determine ranking criteria. The ranking panel will be established and consist of at least two attorneys, along with a CPO personnel specialist who serves as advisor. The selecting official cannot serve on the ranking panel. The selecting official may waive the panel requirement if there are less than eleven minimally qualified applicants. In this situation, all applicants are referred to the selecting official. After the selecting official makes a tentative selection, the CPO will forward the referral list and supporting documents to PP&TO for review and approval by The Judge Advocate General (TJAG).

Noncompetitive appointments are permitted, but only after prior approval by TJAG. Noncompetitive appointments include temporary appointments, promotions to reclassified positions, and lateral transfers.

Civilian Attorney Management is covered in the *JAGC Personnel Policies*, section XIII.[6] Direct questions concerning civilian attorney positions to Mr. Roger Buckner, PP&TO, at DSN: 225-1353 or commercial: (703) 695-1353.

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[3] DEP'T OF ARMY, REG. 623-105, OFFICER EVALUATION REPORTING SYSTEM, para. 5-21 (31 Mar. 1992).

[4] DEP'T OF ARMY, REG. 690-200, CIVILIAN PERSONNEL: GENERAL PERSONNEL PROVISIONS, ch. 213, para. C-3a (1 Feb. 1981).

[5] *Id.* para. 4-5b.

[6] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES (1994-1995) (published each fall).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Reserve Component Promotions Update

Dr. Mark Foley, Ed.D.
Chief, Personnel Actions Office
Judge Advocate Guard & Reserve Affairs Division, OTJAG

Reserve Component Selection Boards

Introduction

Selection boards for Reserve Component (RC) (United States Army Reserve/Army National Guard (USAR/ARNG)) judge advocates are held at the United States Total Army Personnel Command (PERSCOM) Promotion Office at St. Louis, Missouri.

Records and documents to be reviewed by the boards are provided in a promotion consideration file (PCF), which includes an officer's Official Military Personnel File (OMPF), Officer Record Brief (ORB) or Department of the Army (DA) Form 2-1, and photograph. Promotion boards use the "fully qualified" (no quota) method of selection for promotions up to lieutenant colonel and "best qualified" (prescribed maximum number) for promotion to colonel.

Officer Evaluation Reports (OER) for USAR officers must be submitted far enough in advance to arrive at ARPERCEN (ATTN: ARPC-PRE-O) in time to be "profiled" and forwarded to the board no later than the day before the board convenes. Usually allow ninety days to "profile" an OER. Officer Evaluation Reports with a "thru date" longer than ninety days prior to the start of the board must be profiled and placed in your PCF. If the OER covers a period ending less than ninety days prior to the board convening, the evaluation may be profiled, but is not required to be placed in your PCF. If the original OER is unavailable, provide a "certified copy" to ARPC-PRE-O. Certification may be provided by the rater, senior rater, or the Troop Program Unit (TPU) unit administrator. Code 11 OERs are mandatory for most National Guard (NG), Active Guard Reserve (AGR), and USAR TPU officers who were passed over for promotion by the previous reserve promotion board. Officers who have received an OER or Academic Evaluation Report since the announcement of nonselection by the previous board, are not eligible for this type report. Code 21 "complete-the-record" OERs are optional for AGR and NG officers who meet the requirements of paragraphs 5-21 and 8-24 of *Army Regulation (AR) 623-105.*[1] A list of codes used as reasons for submitting evaluations can be found in Appendix K of *AR 623-105.* The minimum rating period requirement for NG and USAR/TPU officers is 120 days. The minimum rating period requirement for AGRs is ninety days.

Officers who are in a zone of consideration may submit a letter to the board regarding matters that they feel are important in the consideration of their record. Letters should be sent to: President, 1995 [name of the promotion rank, *i.e.*, Captains] TAPC-MSL-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Letters read by a promotion board will become a matter of record for that board. Although PERSCOM will maintain these letters, they will not be placed in an officer's official file. Letters of recommendation from other parties sent directly to the board, or letters that reflect on the character, motives, or conduct of other people, will not be presented to the selection board. Letters of recommendation may be submitted if they are attached to your own letter to the board.

Physical examinations must be current for an officer to be promoted. If a physical will be more than four years old before your promotion eligibility date, schedule a new physical early to ensure that you can get it recorded in your file. Promotion orders will not be issued if an officer's physical is out of date.

Officers who are in the zone of consideration will be sent a copy of their official file for review. Submit missing documents, corrections, or additions to the file to the 1995 [name promotion rank, *i.e.*, Majors] TAPC-MSL-P, 9700 Page Avenue, St. Louis, MO 63132-5200. For additional assistance, USAR officers should contact their ARPERCEN Personnel Management Officer (PMO)—LTC Carazza or MAJ (P) Brattain—at 800-325-4916.

Promotion Consideration File

The PERSCOM prepares the PCF for use by the RC selection boards. The PCF should contain the following:

1. All rendered academic and performance evaluation reports.

2. An ORB or DA Form 2-1 (Personnel Qualification Record). Entries pertaining to personal data, military and civilian education, and duty assignment history are required.

3. A photograph taken within the past three years. Height and weight data and signature should be entered on the reverse side of the photograph per *AR 135-155.*[2]

4. The officer's letter to the board president, if provided.

A summary of the contents is set forth in the table below.

Data for compiling the PCF is available from the OMPF and the Career Management Individual File maintained at ARPERCEN. When not found there, it may be available at the unit/field file or in the individual's personal records.

Officers in the zone of consideration are responsible for the following:

1. Reviewing their OMPF and providing PERSCOM a copy of any documents missing from the PCF.

2. Auditing their DA Form 2-1, when requested by the unit personnel clerk.

3. Ensuring that they have a current photograph on file at ARPERCEN. United States Army Reserve TPU members must update their address through the Standard Installation/Division Personnel System—USAR (SIDPERS). Telephone numbers for all USAR members should be updated with the JAG-PMO.

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[1] DEP'T OF ARMY, REG. 623-105, PERSONNEL EVALUATION REPORTS: OFFICER EVALUATION REPORTING SYSTEM (31 Mar. 1992) [hereinafter AR 623-105].

[2] DEP'T OF ARMY, REG. 135-55, ARMY NATIONAL GUARD AND ARMY RESERVE: PROMOTION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OTHER THAN GENERAL OFFICERS, para. 3-3a(4) (1 Sept. 1994).

4. Taking a physical every four years in accordance with *AR 40-501*.[3] If overweight, ensuring that their status in the weight control program is reported to ARPERCEN in accordance with *AR 600-9*, paragraph 2-11.[4] Promotion orders will not be issued to an officer whose physical is out of date or who is overweight.

5. Following up with unit support personnel to ensure that evaluation reports, the DA Form 2-1, and other relevant information gets submitted to ARPERCEN in time to be presented to the board.

6. Ensuring that they have a current address on file at ARPERCEN.

Contents of the PCF

	IRR/IMA	AGR	TPU	DC	NG	Remarks
OMPF-P-Fiche	X	X	X	X	X	1,7
2-1			X		X	2
ORB	X	X		X		3
Photo	X	X	X	X	X	4
Letter to the Board President	X	X	X	X	X	5
Loose Papers	X	X	X	X	X	6

1. Provided by PERSCOM from ARPERCEN and the National Guard Records Services Division, as appropriate.
2. Provided by the officer's servicing personnel/administrative section.
3. Provided by an ARPERCEN personnel management officer.
4. To be provided by the officer for the board's use or by the PMO if a current copy is available in the career management file. The photo must be current within three years.
5. Optional.
6. Includes OMPF documents received too late to be added to the OMPF (Performance-Fiche).
7. OMPF performance documents required to be included in the PCF include (listed in order of precedence):
   Academic Evaluation Reports.
   Officer Evaluation Reports.
   Letter Reports.
   Resident and nonresident course completion certificates.
   Article 15s.
   Letters of reprimand.
   Unfavorable information submitted in accordance with *AR 600-37*.
   Award Orders and certificates.
   Letters of appreciation/commendation

Letter to the Board

Normally, writing to the board serves no purpose. The OMPF, if properly maintained, adequately documents your career achievements and potential for promotion board consideration. In many cases, a soldier's letter tends to detract from the file because of irrelevancy, poor grammar and spelling, too many superfluous enclosures, and sloppy preparation.

If you decide to write, your letter should be short (one page maximum), relevant, free of punctuation and spelling errors, signed, dated, and provide information not already contained in the OMPF. The letter should be a crisp, professional document in appearance, style, and content. Do not use letterhead. Write a military style letter using plain bond paper.

The following items make good enclosures to your letter: current photo; OERs missing from the OMPF; newly acquired diplomas, degrees, and items pertaining to professional stature; information on civilian skills that validate qualifications in a comparable military skill; and statement addressing status in weight control program, if appropriate. Refer to all enclosures in the letter.

The following enclosures normally are irrelevant and tend to detract from your letter: TDA extracts; oath of office; sick call slip; DD Form 149 (Request for Correction to Military Records); DA Form 1379 (USAR Record of Reserve Training); application for correspondence course enrollment; subcourse completion certificates; subcourse completion grades; individual reassignment orders; ADT/ADSW orders; promotion/appointment orders; physical examination/panoramic dental x-rays; DA Form 635 (Recommendation for Award); correspondence concerning a proposed award; DA Form 873 (certificate of clearance); curriculum for USARF School course; APFT score sheets; pay vouchers; retirement point sheets; DA Form 1380 (Record of Individual Performance of Reserve Duty Training); results of AGR continuation board; DD Form 214; unit training schedule.

OER—Center of Mass Concept

Officer Evaluation Reports are an important part of your PCF. One part of the OER that is not understood by all is the senior rater profile. The core concept of the senior rater profile is the center of mass concept. The center of mass concept establishes a consistency between the way senior raters evaluate and the way selection boards interpret the evaluation. This assists in ensuring that the message sent by the senior rater is the same as the one received by the selection board. This, in turn, provides sufficient senior rater confidence to accept the opportunity to indicate the very best and those below the standard without fear of hurting the rest.

The value of the potential evaluation box checked in Part VII depends on the senior rater's profile. The center of mass, or the "pack," normally is the most frequently used box. The selection board is instructed to look at the box checked in rela-

[3] DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989).

[4] DEP'T OF ARMY, REG. 600-9, PERSONNEL—GENERAL: THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1988).

tion to the pack (most frequently used box) and make an assessment. Is the rated officer ahead of the pack, with the pack, or behind the pack? The board members then read the narrative and move on to the next OER. The narrative is very important, but glowing words fall short if the board member already has determined that the senior rater's evaluation is behind the pack.

What should a senior rater do if he/she determines that his/her profile is not credible? The National Guard Personnel Center and the ARPERCEN have Senior Rater Profile Restart Programs. Senior raters should not shift philosophy prior to restart of the senior rater profile. A shift in rating philosophy without benefit of a restart may not convey the intended potential evaluation to selection boards. Senior raters should not change their rating philosophy unless they are absolutely sure that their profiles have been restarted.

Colonel Selection Board

The RC selection board for colonel will convene in late July 1995. The zone of consideration is lieutenant colonels with a date of rank of 1 January 1992 or earlier. Selection rate for RC Judge Advocate General's Corps (JAGC) officers considered for promotion by the 1994 selection board was seven percent of those fully qualified for promotion. Nonselection for colonel is not considered a pass over as it is for lieutenant colonels and below. The RC selection rate to colonel for all branches (excluding Army Medical Department and Chaplain) was eleven percent in 1994.

Lieutenant Colonel Selection Board

Results of the 1994 RC selection board for lieutenant colonel were released in early 1995. The selection rate for RC JAGC officers considered for promotion to lieutenant colonel by the 1994 selection board was forty-six percent. The selection rate for those who were educationally qualified was seventy-nine percent. Officers who have not completed at least fifty percent of Command and General Staff College will not be selected for promotion. The 1995 board will be scheduled to convene in October 1995. The zone of consideration will be majors with a date of rank of 1 January 1990 or earlier and seventeen years commissioned service (including constructive credit) or forty-two years or older.

What Is the Reserve Officers Personnel Management Act?[5]

The Short Answer

The Defense Authorization Bill for Fiscal Year 1995 was passed by Congress and signed by the President, making the provisions of the Reserve Officers Personnel Management Act (ROPMA) a reality.

Background

The Defense Officer Personnel Management Act (DOPMA), which was passed in 1980, was the first comprehensive revision of the many statutes relating to the appointment, promotion, tenure, and separation of regular commissioned officers in the military. The DOPMA included three major changes in the way active duty officers are managed and requires: (1) a single active duty list of officers in each service; (2) a single promotion system for officers on the active duty list; (3) an increase in the numerical limits on the number of regular officers to allow the services to establish an all regular career force.

Having passed the DOPMA, the Congress directed the Department of Defense (DOD) to prepare similar legislation to simplify and rationalize the myriad officer management policies that had grown up in the personnel operations of the various services' RCs. The DOD labored mightily for a number of years to forge draft legislation that would achieve some level of uniformity and at the same time, meet the unique personnel management needs of the individual services. It has taken several years for Congress to approve the ROPMA. Last year, Congressman G. V. "Sonny" Montgomery, who has sponsored the legislation several times previously, attached the bill's provisions to the Defense Authorization Bill and, as a result of his efforts and focused constituent support, the bill finally passed intact.

Enactment of the ROPMA will constitute the first comprehensive overhaul of Reserve officer personnel management statutes since the Reserve Officer Personnel Act of 1954. The ROPMA's changes are primarily concerned with the appointment, promotion, tenure, and separation of officers not on active duty. The ROPMA parallels the DOPMA, ensuring that Reserve officer personnel management policies are compatible with those of active duty officers. For instance, the ROPMA would establish a *Reserve active status* list—a single list by grade of all Reserve officers in each service—that would parallel the active duty list established by the DOPMA. At the same time, the ROPMA would preserve those aspects of Reserve officer personnel management that have no active duty counterpart. Thus, the ROPMA leaves intact the *unit vacancy* promotion system in the Army and Air Force National Guard, while establishing a *position vacancy* promotion system for the Army and Air Force Reserves.

Major Features of the ROPMA

Reorganization of Title 10 RC Sections.—The ROPMA enacts a *new subtitle E of Title 10,* United States Code, that consolidates all provisions of Title 10 pertaining to the RC, including those that the ROPMA adds.

[5]This note was adapted from information provided by the Reserve Officers Association of the United States, 1 Constitution Avenue NE, Washington, D.C. 20002-5655.

Reserve Active Status List.—The ROPMA requires the service secretaries to maintain a single list of all Reserve officers in an active status who are not on the active duty list. Officers will be carried on the list in order of relative seniority.

For example, officers of the ARNG and the Army Reserve will be carried on a single list maintained for officers of the Army's RC.

Promotion System

The ROPMA establishes uniform minimum and maximum years of service for each grade, and within these minimum and maximum time in grade requirements eligibility for promotion consideration would be determined for all RC officers.

Service secretaries will be authorized to establish promotion zones, including secondary zone, similar to those that now exist in the active component

For officers in the Army and Air Force Reserves, the ROPMA establishes a position vacancy promotion system so that Reserve officers can be considered to fill any vacant position, whether in a unit or in other mobilization positions.

The ROPMA will continue the current unit vacancy promotion system for the Army and Air National Guard.

The ROPMA eliminates the existing promotion eligibility criterion that RC officers meet certain total commissioned time in service requirements.

The ROPMA provides that officers ordered to active duty under emergency conditions will continue to be administered under the Reserve promotion system (*i.e.*, excluded from the active duty list) for up to two years to minimize personnel turbulence.

Competitive promotion categories (such as line officers, medical corps, and chaplains) will be authorized for RC officers being considered for promotion. The JAGC may be authorized a separate RC promotion board.

The promotion system will change from the current "fully qualified" to a "best qualified" standard. Currently, promotion to the rank of lieutenant colonel and below are based on the officers being fully qualified. That is, the officers are considered without regard to vacancies; promotion is based on meeting mandatory military educational requirements, active participation in the reserve program, overall record of performance, and potential to serve successfully at the higher grade. Under a best qualified system, the same factors stated above are considered, but a maximum number of promotions are authorized. Each officer is rated and given a numerical score which is rank ordered into an order of merit list (OML). The OML becomes the basis for selecting the final promotion list. This list cannot exceed the prescribed maximum number of officers to be selected for promotion to that grade.

Voluntary Delay of Promotion.—Uniform authority will be granted to the Service Secretaries to establish procedures whereby Army and Air Force Reserve and National Guard officers may request a voluntary delay in promotion of up to three years. Officers granted such delays would have an effective date of promotion at the time they actually accept appointment to the higher grade.

Continuation Authority.—The ROPMA provides uniform authority for the Service Secretaries to establish selective continuation boards. These boards will be authorized to retain in an active status RC officers who otherwise would be subject to removal from the Reserve active status list because they had twice failed to be selected for promotion or because they exceeded the total allowable years of commissioned service. The individual must request continuation beyond the mandatory removal date if twice nonselected for promotion or if being removed for years of service.

Selective Retention.—The ROPMA will provide uniform authority allowing the selective early removal of RC officers with at least thirty years of total commissioned service or twenty years of satisfactory service if the service secretary determines that an excess of officers in any grade exists.

Maximum Age.—The ROPMA will, with certain limited exceptions, establish sixty years of age as the common maximum age in an active status for all Reserve officers in the grade of colonel (and Navy captain) or below in all RCs.

Signed into law by the President, the ROPMA will become effective on 1 October 1996.

Interim Change

Army Regulation 140-10 has been changed (effective 5 October 1994 until 1 October 1996) to adjust the method of determining the Mandatory Removal Date (MRD) of reserve officers. Constructive credit will no longer be considered when computing removal date based on years of service; only the actual commissioned service will be used in determining MRD for years of service. Lieutenant colonels and below will be removed thirty days after they complete twenty-eight years commissioned service as a commissioned officer of any component of the armed forces or of the Army without specification of component—or reach age sixty, whichever comes first.

Colonels will be removed thirty days after the completion of thirty years commissioned service or five years in grade, which ever comes last—or age sixty, if it comes before either of previous criterion.

Effective 1 October 1996, the provisions of the ROPMA will become effective for determining MRD—the ROPMA provisions are approximately the same as in this interim change, except that the five years time-grade rule for colonels will be dropped from the MRD calculation.

Evaluation Report Appeals[6]

In the total Army, over 100,000 evaluation reports are written on officers and warrant officers each year. Historically, the vast majority of those who render evaluation reports discharge this important responsibility with due care and consideration in accurately recording the performance and potential of their subordinates. In preparing this large number of evaluation reports on an annual basis, normally some rating officials fail to write evaluation reports as accurately and objectively as intended in the governing regulations. The purpose of this note is to provide information intended to assist the soldier in preparation of an evaluation report appeal in conjunction with *AR 623-105*.[7]

What Should I Appeal?

If you receive an evaluation report that you firmly believe is an inaccurate or unjust evaluation of your performance and potential, or one that contains administrative errors, that report may be a candidate for an appeal. Likewise, a report that was not rendered in accordance with *AR 623-105* in effect at the time of preparation may be considered for appeal.

If you simply are dissatisfied with receiving a good report (for example, a report containing nothing but favorable comments) because you believe that it should be better, it is difficult to successfully challenge the judgment of your rating officials with clear and convincing evidence that you deserve better. Even if successful, the remedy applied probably would be to remove the portions proven inaccurate or unjust, rather than raising the scores or block placements.

In deciding what to appeal, consider whether you can gather useful evidence in support of an appeal. Your self-authored statement alone is insufficient evidence of an inaccurate, unjust, or administratively flawed evaluation report. Remember, the report as accepted by DA, is presumed to be correct until you prove that it is not.

When Should I Appeal?

The first step in the Army Redress System is the Commander's Inquiry. The primary purpose of the Commander's Inquiry is to provide a greater degree of command involvement in preventing obvious injustices to the rated officer and correct errors before they become a matter of permanent record. A secondary purpose is to obtain command involvement in clarifying errors or injustices after the OER is accepted at Headquarters, DA (HQDA). However, in these after-the-fact cases, it is not intended to be a substitute for the appeals process, which is the primary means of addressing errors and injustices after they have become a matter of permanent record. The inquiry must be completed not later than *120* days after the "Thru" date of the OER. *Army Regulation 623-105* contains additional information on the commander's inquiry.[8]

The second step in the Army Redress System is submitting the OER appeal. Begin preparing the appeal as soon as possible after receiving an evaluation report that you have good reason to strongly disagree. You should consider that some individuals still serving under the same rating chain are reluctant to provide statements. Waiting too long, however, adds to the difficulty of locating those who might offer support, or in gathering records that might serve as evidence.

A change to *AR 623-105*, effective 1 March 1988, requires substantive appeals to be submitted within *five* years of the OER's completion date. This restriction only will be waived under exceptional circumstances. The Appeals and Corrections Branch will continue to consider administrative appeals based on administrative error regardless of the period of the report. However, the likelihood of successfully appealing a report diminishes, as a rule, with the passage of time. Accordingly, promptly submit appeals. If you are requesting a waiver, you will need to add a paragraph to your cover memorandum requesting a waiver and briefly explaining why you waited beyond the five-year period to submit an appeal. The Officer Special Review Board will approve or disapprove your request for waiver.

What Are My Chances of Successfully Appealing an Evaluation Report?

Your success in appealing a report will depend largely on your effort to present clear and convincing evidence that the evaluation is inaccurate or unjust. The best evidence is obtained from third parties who were in a position to observe your performance from the same perspective as your rating officials. Remember, the burden of proof rests on you.

Statistics are not published on the approval/disapproval rate of evaluation report appeals. Furthermore, statistics do not reflect a true picture of the program's effectiveness. Headquarters, DA receives some appeals that only meet the minimum acceptance and processing requirements of the regulation, while many others are well documented and reflect the efforts of the individuals appealing the reports. Portraying a picture of the appeal approval rate by using statistics that are comprised of the cases containing minimal evidence and the cases containing quality evidence would present a distorted picture on the effectiveness of the appeal program.

Because each evaluation report is unique, each appeal is unique. Remember that the evaluation redress system is

[6]This note was taken from a *Guide for Preparation of Evaluation Report Appeals*, a pamphlet dated April 1994, prepared by the Appeals and Corrections Branch, United States Total Army Personnel Command, Alexandria, Virginia.

[7]*See* AR 623-105, *supra* note 1, ch. 9.

[8]*Id.* paras. 3-15, 5-30.

designed to correct error or injustice, not weakness. Evaluations that reflect duty performance not on a level with previous or subsequent reports are not presumed to be in error. The success of your appeal depends mainly on you!

Preparing to Appeal

Having decided what and when to appeal, begin laying the groundwork by thoroughly reviewing *AR 623-105*. Using your copy of the challenged report, note any instances where provisions of the governing regulation were not followed. You may want to seek assistance from your local Personnel Service Center (PSC) or Staff Judge Advocate (SJA) in accomplishing this task. While minor inconsistencies or irregularities in the preparation of an evaluation report usually are not the sole basis for removal, they add to the overall consideration of the merits of an appeal. Serious irregularities—such as improper rating officials—may warrant full or partial relief.

What Type of Evidence Do I Need?

Evidence submitted includes statements from third parties and/or rating officials, and often includes documents from other sources (such as investigations, inspections). There are no constraints on type and amount; however, *AR 623-105* [9] provides fairly extensive guidance as to what will or will not be helpful. Generally speaking, *AR 623-105* addresses evidence in terms of its relevance to the contested report and an appellant's contentions. Vantage points and firsthand knowledge are important factors in selecting third parties to support an appeal.

Request the specific changes that you believe are justified by the evidence you provide. Your request may be a combination of changes or total removal of the report. Remember that you must document your request with sufficient evidence to warrant corrective action.

Army Regulation 623-105 contains appropriate appeal correspondence formats and recommends that the cover letter be a typed military memorandum on letterhead or white bond paper. In whatever form that you present your appeal, all enclosures should be tabbed and listed for easy reference, and they should be cited in the written appeal as evidence to support each contention that you are making. *Army Regulation 623-105* provides an example of an appeal at appendix N.

Submission

On receipt of supporting statements and documentary evidence, and before finalizing the appeal, you may wish to have a disinterested third party review the entire package. This third party review should help to remove emotionalism and poor logic from your appeal. Do not submit the appeal until you are satisfied that you have presented a logical, fully documented, well-constructed case.

Submit the finalized original appeal, plus one complete copy (which does not have to be certified) directly to the address listed in the regulation for your component. Verify that all necessary information (*i.e.*, signature, date, mailing address, telephone number, and priority) has been included before forwarding the appeal. All supporting statements must be originals and all documents provided must be original or certified true copies. Your local SJA or PSC can certify the documents. The copy of the evaluation report does not have to be a certified copy because the original copy is on file in your career management information file. If you know the current phone numbers of the rating officials on the contested report, include them in your appeal correspondence.

Processing and Disposition of Appeals

The Appeals and Corrections Branch of the respective active, Reserve, or NG component will review the case on receipt and either notify you by letter that the appeal has been accepted or that the case is being returned for lack of usable evidence. The appropriate Appeals and Corrections Branch for your component will resolve administrative appeals. Substantive appeals will be forwarded for final review and decision by the DCSPER Officer Special Review Board (OSRB). On final determination of the case, the appropriate agency will notify you of the outcome.

The time necessary to process an appeal varies with the type and complexity of the appeal, the volume of appeals being processed at the time your appeal is accepted, and the extent of deliberation required to make an appropriate decision. Some Priority 3 cases will take six months or longer to adjudicate while the Priority 2 and 1 cases will take less time. Processing priorities are explained in the Army Regulations. That you are scheduled to be considered by a DA Promotion Board will *not* cause your appeal to be expedited or change your priority.

To ensure full and just consideration of an evaluation report appeal, the OSRB normally contacts the primary members of the rating chain for their comments, which may or may not assist an appellant. Because the rating chain was entrusted with the responsibility for rating a subordinate, the information that they provide cannot be disregarded. On the other hand, it does not automatically outweigh credible evidence provided by an appellant that refutes the evaluation. Headquarters, DA must carefully evaluate and weigh all evidence to arrive at a fair, impartial, and just determination. After approving an appeal where the individual was previously nonselected by a DA Selection Board for promotion, the Special Review Board also will consider whether promotion reconsideration is warranted. The appellant will be informed of this

[9] *Id.* ch. 9, app. N.

decision when notified of the SRB decision. The Promotions Branch will provide the appellant the outcome of the relook board.

In all cases, whether the appeal is approved or denied, totally or in part, documentation is placed on the OMPF. The performance portion of the OMPF ("P" fiche) is amended to include either (1) a memorandum for record which documents the amendment or explains nonrated time or (2) the HQDA letter which notifies the appellant that his or her appeal has been denied. When the appeal is denied, either totally or in part, the restricted portion of the OMPF ("R" fiche) also is amended (or created, if there was previously no "R" fiche for the appellant). In this case, a complete copy of the appeal correspondence is placed on the "R" fiche.

If the appeal is denied, an appellant may seek new, additional evidence and submit a new appeal or may request relief from the next agency in the Army's redress system, the Army Board for Correction of Military Records (ABCMR). *Army Regulation 15-185*[10] governs operation of the ABCMR. If your case was decided by the OSRB, a case summary of the Board's consideration is available under the Privacy Act.

A request in accordance with *DA Pamphlet 25-51*[11] for a copy of the case summary under the Freedom of Information Act/Privacy Act should be sent to:

HQDA (DAPE-ZXI-SP)
Washington, D.C. 20310-0300

Summary Checklist for the Appellant

Appellant's Letter

Typed, military memorandum on letterhead or white bond paper. In the first paragraph identify name, rank, branch, social security number, period of report and priority of the appeal. Include a DSN or commercial telephone number and correct mailing address (you may use your home address). Use this memorandum to transmit the appeal. Concisely explain the nature of your disagreement and the corrective action requested. If a detailed explanation of the circumstances of a report is required, add a statement as an enclosure to the appeal. Remember that the OSRB will not contact you, but more than likely will contact the rating officials for their side of the story. Therefore, you must provide the OSRB with as much information as possible in your own statement to assist the OSRB in their adjudication. List and identify all enclosures. Sign and date the memorandum.

Evidence

Appeals based on technical (administrative) error must be proven by original or certified true copies of appropriate documents (*e.g.*, orders, leave and earning statements, appropriate medical documents verifying height/weight, APFT results (DA Form 705), DA Form 2-1). Claims of inaccurate or unjust evaluations must be supported by originals of typed statements from knowledgeable observers during the report period. These statements should be signed, dated on letterhead or white bond paper and should be specific in content. Additional statements from rating officials are acceptable, but will not be the sole basis of the appeal. Documents such as ARTEP, AGI, and Command Inspection results, may be useful in supporting a substantive appeal.

Academic Year (AY) 1995 Judge Advocate Triennial Training and Judge Advocate Officer Advanced Course (Phase II)

Academic Year 1995 Judge Advocate Triennial Training (JATT) and the Judge Advocate Officer Advanced Course (JAOAC) Phase II, will be conducted at The Judge Advocate General's School in Charlottesville, Virginia, beginning 19 June 1995 and ending on 30 June 1995. Officers desiring to attend JAOAC must complete Phase I (Nonresident) portion before 20 May 1995. Any requests for exception must be made in writing to the Office of The Judge Advocate General, Guard and Reserve Affairs Division (ATTN: CPT Storey), 600 Massie Road, Charlottesville, Virginia 22903-1781. Captain Storey.

The general areas of law for AY 95 JATT will be international/operational law and administrative/civil law (please note: the February GRA Note erroneously reported criminal law as one of the subject areas). The ATRRS course numbers are as follows:

Course	*Course Number*	*Class Number*
JATT	5F-F57	095
JAOAC	5F-F55	095

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule please direct them to the local action officer or CPT Eric G. Storey, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

[10] DEP'T OF ARMY, REG. 15-185, BOARDS, COMMISSIONS, AND COMMITTEES: ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977).

[11] DEP'T OF ARMY, PAMPHLET 25-51, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM—SYSTEM NOTICES AND EXEMPTION RULES (21 Sept. 1988).

THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
1-2 Apr 95	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Magers BG Cullen MAJ Diner MAJ Kohlmann LTC Hamilton	COL George A. Hopkins 2002 South Holt Road Indianapolis, IN 46241 (317) 457-4349
7-9 Apr 95	Orlando, FL 174th LSO Airport Marriott 7499 Augusta National Dr. Orlando, FL 32822	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	MG Nardotti BG Lassart MAJ DeMoss LTC Winters Dr. Foley	MAJ John J. Copelan, Jr. Broward County Attorney 115 South Andrews Avenue Suite 423 Fort Lauderdale, Fl 33301 (305) 357-7600
29-30 Apr 95	Columbus, OH 83d ARCOM/9th LSO/ OH ARNG Best Western-Columbus North 888 East Dublin-Granville Rd. Columbus, OH 43229	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Cuthbert BG Lassart MAJ J. Frisk MAJ Wright COL Reyna	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
5-7 May 95	Huntsville, AL 121st ARCOM Corps of Engineer Ctr. Huntsville, AL 35805	AC GO RC GO Contract Law Crim Law GRA Rep	MG Nardotti BG Cullen MAJ Hughes MAJ A. Frisk COL Reyna	LTC Bernard B. Downs, Jr. HHC, 3d Trans Bde 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033
12-13 May 95	Gulf Shores, AL AL ARNG	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	 BG Cullen MAJ Hughes MAJ Martins Dr. Foley	COL Larry Craven Office of the Adj General ATTN: AL-JA P.O. Box 3711 Montgomery, AL 36109 (205) 271-7471
12-14 May 95	Kansas City, MO 89th ARCOM Westin Crown Center One Pershing Road Kansas City, MO 64108	AC GO RC GO Ad & Civ GRA Rep	BG Magers BG Lassart MAJ Jennings LTC Menk	MAJ Rick Tague 89th ARCOM Attn: AFRC-AKS-SJA 3130 Geo Washington Blvd. Wichita, KS 67210-1598 (316) 681-1759 X228

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name and Number—(for example—133 **Contract Attorneys' Course 5F-F10**)

Class Number—(for example—**133** Contract Attorneys' Course 5F-F10)

To verify if you have a confirmed reservation, ask your training office to provide you a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1995

1-5 May: 6th Law for Legal NCOs Course (512-71D/ E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).

15 May-2 June: 38th Military Judge Course (5F-F33).

22-26 May: 42d Fiscal Law Course (5F-F12).

22-26 May: 47th Federal Labor Relations Course (5F-F22).

5-9 June: 1st Intelligence Law Workshop (5F-F41).

5-9 June: 130th Senior Officers Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar.

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 6th Legal Administrators Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

8-11 August: Military Justice Managers Course (5F-F31).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 2d Federal Courts and Boards Litigation Course (5F-F14).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

July 1995

10-11, ESI: Export Controls and Licensing, Washington, D.C.

11, ESI: Protests, Seattle, WA.

11-14, ESI: Subcontracting, San Diego, CA.

12-14, ESI: Changes, Claims, and Disputes, Seattle, WA.

18-21, ESI: Negotiation Strategies and Techniques, Denver, CO.

24-28, GWU: Government Contract Law, San Diego, CA.

25-28, ESI: Preparing and Analyzing Statements of Work and Specifications, Washington, D.C.

26, PBI: Tax Traps in Divorce Law/Satellite Program, Harrisburg, PA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1995 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer.*

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no

charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A281240 Office Directory/JA-267(94) (95 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A282033 Preventive Law/JA-276(94) (221 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A280725 Office Administration Guide/JA 271(94) (248 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).

AD A274370 Tax Information Series/JA 269(94) (129 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).

AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A283503 Government Information Practices/JA-235(94) (321 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R

and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made

available on the BBS; publication date is available within each publication):

FILE NAME	*UPLOADED*	*DESCRIPTION*
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Con sumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Con sumer Law Guide—Part B, May 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

Colonel Cheryl L. Nilson, *Defense Contractor Recovery of Cleanup Cost at Contractor Owned and Operated Facilities*, 38 A.F.L. REV. 5 (1994).

David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), USMJ*, 38 A.F.L. REV. 63 (1994).

Holly M. Stone, *Post-trial Contact with Court Members: A Critical Analysis*, 38 A.F.L. REF. 179 (1994).

William Spalding, *Interviewing Child Victims of Sexual Exploitation*, 23 POLYGRAPH 280 (1994).

Army Appellate Court Reconsiders Polygraph Ban, 23 POLLYGRAPH 324 (1994).

6. Erratum

The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?, an article printed in the January 1995 issue of *The Army Lawyer*, recommended that judge advocates who support deploying forces to Saudi Arabia should coordinate with the United States Military Training Mission (USMTM).

However, judge advocates should use their technical legal chain to make contact with the SJA, USMTM. For Army judge advocates, this mandates coordination through the Command Judge Advocate, ARCENT-SA, and the SJA, Third Army.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

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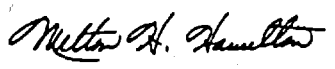
By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



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